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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No.....

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

HURON HOLDING CORPORATION, a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,

Appellee.

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

STRAWN & CO. INC. STATIONERS-PRINTERS, BOISE

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

HURON HOLDING CORPORATION, a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,

Appellee.

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JESS HAWLEY,

OSCAR W. WORTHWINE,

Boise, Idaho

Attorneys for Appellant.

WILLIAM H. LANGROISE,

ERLE H. CASTERLIN,

Boise, Idaho

Attorneys for Appellee.

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INDEX TO BILL OF EXCEPTIONS

(Removed from State Court)

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM.

NOTICE

Filed in the State Court

July 17, 1936

TO THE ABOVE NAMED PLAINTIFF AND TO W. H. LANGROISE, ESQUIRE, AND SAM S. GRIFFIN, ESQUIRE, THEIR ATTORNEYS:

PLEASE TAKE NOTICE, that the defendant Manufacturers Trust Company herein will on July 17, 1936, file in the above entitled court its petition and bond for the transfer and removal of the above entitled action from the court wherein said cause is now pending into the District Court of the United States, for the District of Idaho, Southern Division, a copy of which petition and bond are herewith served upon you, and in accordance with and pursuant to

said petition and bond, will, on Monday, July 27, 1936, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard, present the same to the Honorable John C. Rice, Judge of the above entitled court in his chambers of said court at Caldwell, Canyon County, Idaho, and pray for an order approving said bond and removing said cause to said District Court of the *of the* United States for the District of Idaho, Southern Division.

Dated this 17th day of July, 1936.

HAWLEY & WORTHWINE

HAWLEY & WORTHWINE

Residence: Boise, Idaho

Attorneys for Defendants.

Service by receipt of copy of the foregoing notice and papers therein referred to, is hereby admitted this 17th day of July, 1936.

W. H. LANGROISE

W. H. LANGROISE

SAM S. GRIFFIN

SAM S. GRIFFIN

Attorneys for Plaintiffs.

(Title of Court and Cause)

PETITION FOR REMOVAL

Filed in the State Court

July 17, 1936.

TO THE HONORABLE THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM:

COME NOW, Your Petitioner Manufacturers Trust Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, a resident and citizen of the State of New York, with its principal place of business being in New York City, said State of New York, and respectfully shows and represents to this honorable court:

I.

That this is a suit of civil nature and that the amount in dispute between the plaintiff and the defendants exceeds, exclusive of interest and costs, the sum or value of $3,000.00. That this is an action brought and maintained by the plaintiff to secure a judgment against the defendants for the recovery of personal property alleged to be wrongly detained by the defendants, or in lieu thereof, $55,000.00 al-

leged to be the value of said property together with the damages for detention of said property and costs of suit and other wrongful purposes in their possession, as more fully appears from the plaintiff's complaint on file herein.

II.

That the said action was commenced in the above entitled court on the 29th day of June, 1936, and that Summons was issued out of said court in said cause and served on the 29th day of June, 1936, on Lillian M. Campbell, Auditor and Recorder of Gem County, State of Idaho; under the claim that service on said Auditor and Recorder is service upon the said defendant corporation and service was also had on said date upon the defendant, Fred Turner; that the time of appearance on the part of the defendants has not expired; that the defendant, Manufacturers Trust Company, has appeared specially in said action. The Defendant, Alexander Lewis, has not been served.

III.

That the District Court of the United States, in and for the District of Idaho, Southern Division thereof, has original jurisdiction of this action, and that your petitioner desires that said action be removed from the court wherein it is now pending into the said District Court of the United States, for the District of Idaho, Southern Division.

IV.

That your petitioner avers that at the time of the commencement of this action, and ever since, the plaintiff, has been and now is, citizen and resident of the State of Idaho; that the defendant, Manufacturers Trust Company, a corporation, at the time of the commencement of this action, and ever since, has been and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is not now, and never has been a resident or citizen of the State of Idaho, but is a resident and citizen of the State of New York; and the defendant, Fred Turner, is a citizen and resident of Gem County in the State of Idaho, and the defendant, Alexander Lewis is a citizen and resident of the State of New York.

V

Your petitioner avers that the defendant, Fred Turner, has no interest in this controversy and is in fact not a claimant to or owner of the personal property described and involved in the said complaint, and is merely an employee of the Huron Holding Corporation, organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of the State of New York, and said corporation is not a party defendant to this action. That the said defendant, Fred Turner, makes no claim to said property or other possessions thereof in his individual capacity, or otherwise as an employee of said

Huron Holding Corporation; That the said defendant, Fred Turner, is neither officer, director or stockholder of or in said Huron Holding Corporation, but the said, Fred Turner, is not a proper party defendant and is in no wise interested in the property described and the plaintiff is entirely separable, unconnected with, and the plaintiff is entirely separable, unconnected with, and apart from any controversy or issue of law or fact between the plaintiff and your petitioner. That, therefore, your petitioner avers that this controversy and every issue of law and fact therein is between citizens and residents of different states, and that more thaan $3,000.00, exclusive of interest and costs, is involved herein.

VI

Your petitioner offers herewith a bond with good and sufficient surety for its entry in said District Court of the United States, in and for the District of Idaho, Southern Division, sitting at Boise, Idaho, within thirty days from the *the* date of filing this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States, if said District Court of the United States shall hold that such suit was wrongfully and/or improperly removed thereto, and as provided by the statutes of the United States in such cases made and provided.

Your petitioner prays this court to proceed no further herein except to make the order of removal

as required by law and the statutes of the United States, and to accept and approve said bond and surety, and to cause the record herein, as aforesaid, to be removed into the District Court of the United States, in and for the District of Idaho, Southern Division.

And your petitioner will ever pray.

HAWLEY & WORTHWINE

HAWLEY & WORTHWINE

Residence: Boise, Idaho,
Attorneys for Petitioner.

STATE OF IDAHO, }
COUNTY OF ADA } ss.

JESS HAWLEY, being first duly sworn, upon his oath, deposes and says:

That he is one of the attorneys for Manufacturers Trust Company, a corporation, the defendant, and makes this verification for and on behalf of the said defendant for the reason that all of the officers of the said Manufacturers Trust Company, a corporation, are absent from Ada County, State of Idaho, where affiant resides; that the facts set forth in the foregoing petition are within affiant's knowledge; that affiant has read the foregoing petition and knows the contents thereof; and that the facts stated therein are true to his own knowledge*d*.

JESS HAWLEY.

Subscribed and sworn to before me this 17th day of July, 1936.

(SEAL) WALTER G. BELL
Notary Public for Idaho Residing at Boise, Idaho.

Service by receipt of copy acknowledged this 17th day of July, 1936.

W. H. LANGROISE
SAM S. GRIFFIN
Atty. for Plft.
Boise, Idaho

(Title of Court and Cause)

BOND OF REMOVAL

Filed in the State Court
July 17, 1936

KNOW ALL MEN BY THESE PRESENTS, That Manufacturers Trust Company, a corporation, as principal, and National Surety Corporation, a corporation, as surety (said surety being duly and fully authorized under the acts of Congress and laws of the State of Idaho) are held and firmly bound unto the above named plaintiff, Lincoln Mine Operating Company, a corporation, in the sum of Five Hundred Dol-

lars ($500.00), for the payment of which well and truly to be made unto the said named plaintiff and its assigns, it binds itself, its heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents; upon condition nevertheless that

WHEREAS, the above named plaintiff has heretofore brought a suit of civil nature in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Gem, against Manufacturers Trust Company, a corporation, Alexander Lewis, and Fred Turner, defendants; and,

WHEREAS, the said defendant, Manufacturers Trust Company, simultaneously with the filing of this bond, intends to file its petition in said suit in such state court for the removal of such suit into the District Court of the United States for the District of Idaho, Southern Division, the District in which the said suit is pending according to the provisions of the Acts of Congress in such case made and provided.

NOW, THEREFORE, the condition of this obligation is that if the said petitioner shall enter in the District Court of the United States for the District of Idaho, Southern Division, within thirty days from the date of the filing of said petition, a certified copy of the record in such suit and shall pay all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully and/or improperly removed thereto, and shall also appear

and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

Dated this 17th day of July, 1936, at Boise, Idaho.

MANUFACTURERS TRUST COMPANY, a corporation,
By JESS HAWLEY
One of its attorneys

(CORPORATE SEAL)

NATIONAL SURETY CORPORATION, a corporation,
By F. G. ENSIGN
FRANK G. ENSIGN,
Its Attorney in fact.

Countersigned:

F. G. ENSIGN
FRANK G. ENSIGN,
Resident Agent,
Residing at Boise, Idaho.

Service by receipt of copy acknowledged July 17, 1936.

SAM S. GRIFFIN
W. H. LANGROISE
Attys. for plft.
Boise, Idaho.

(Title of Court and Cause)

ORDER OF REMOVAL

Filed in the State Court

August 4, 1936

The petition for removal in the above entitled cause coming on regularly for hearing, this 27th day of July, 1936, before the Honorable John C. Rice, in his chambers in the Court House of Canyon County, at Caldwell, Idaho.

It is hereby ORDERED that the said cause shall be removed to the District Court of the United States for the District of Idaho, Southern Division, and the Clerk of the above entitled cause is hereby ordered to make proper, necessary certification and delivery of the record herein.

Dated this 27th day of July, 1936.

JOHN C. RICE

JOHN C. RICE

District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

LINCOLN MINE OPERATING COMPANY, a corporation,

Plaintiff,

vs.

MANUFACTURERS TRUST COMPANY, a corporation, HURON HOLDING CORPORATION, a corporation, ALEXANDER LEWIS and FRED TURNER,

Defendants.

No. 1953

AMENDED COMPLAINT

Filed August 17, 1937

COMES NOW, the plaintiff, and with permission of the Court files this its Amended Complaint, and complains of defendants, and for a cause of action alleges:

I.

That at all times hereinafter mentioned, plaintiff Lincoln Mine Operating Company was, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of Idaho;

II.

That at all times hereinafter mentioned, defendant Manufacturers Trust Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and has been for more than a year last past, and now is, doing business within the County of Gem, State of Idaho; that said corporation does not have any designated person actually residing in said Gem County, Idaho or within the State of Idaho, upon whom process can be served as provided by the laws of Idaho; that at all times hereinafter mentioned defendant Huron Holding Corporation was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and has been for more than a year last past, and now is, doing business within the County of Gem, State of Idaho; that said corporation does not have any designated person actually residing in said Gem County, Idaho, or within the State of Idaho, upon whom process can be served as provided by the laws of Idaho;

III.

That at all times herein mentioned, plaintiff Lincoln Mine Operating Company was the owner and entitled to the possession of that certain personal property more specifically and in detail set forth and described in Exhibit A hereunto attached, and by this reference made a part hereof, now, and at all times herein mentioned, situate in and upon that certain

group of lode mining claims commonly known as the Lincoln Mine, in the West View Mining District, Gem County, Idaho; that said personal property is of the reasonable value of $55,000.00;

IV

That on or about the 4th day of June, 1936, and before the commencement of this action, the defendants having possession of said property, the plaintiff demanded of the defendants the possession of said personal property, but the defendants refused and still refuse to deliver the possession thereof to plaintiff, and said personal property has been, and now is, wrongfully detained by defendants; that the cause of the detention thereof by defendants is unknown to the plaintiff;

V.

That said personal property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under execution or an attachment against the property of the plaintiff;

VI.

That by reason of the foregoing plaintiff has been damaged by defendants in the sum of $55,000.00, the value of said property, and in the additional sum of $100 per day for each and every day so wrongfully detained, as aforesaid, by the defendants.

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, for the recovery of

said personal property, or for the sum of $55,000.00, the value thereof, in case a delivery cannot be had, together with damages for its detention, for costs of suit, and all other relief proper in the premises.

W. H. LANGROISE
SAM S. GRIFFIN
Attorneys for Plaintiff,
Residence: Boise, Idaho.

STATE OF IDAHO, }
COUNTY OF ADA. } ss.

WILLIAM I. PHILLIPS, Being first duly sworn. deposes and says:

That he is the President of the Lincoln Mine Operating Company, a corporation, plaintiff in the above entitled cause, and makes this verification as such officer and in its behalf; that he has read the foregoing Complaint, knows the contents thereof, and believes the facts therein stated to be true.

WILLIAM I. PHILLIPS

SUBSCRIBED AND SWORN to before me this 12th day of August, 1937.

L. L. SULLIVAN
Notary Public for Idaho, Residing at Boise, Idaho.
(SEAL)

EXHIBIT "A"

1 Cook stove—Tennessee Range.

1 Kelvinator No. 1267 with Wagner 1½ H. P. Motor No. 8-1761-2 and Cutler-Hammer Electric Starter.

2 Common chairs.

1 Iron bed with springs and mattresses.

1 Wash stand.

3 Wooden dining tables.

1 Small table.

8 Wooden benches.

1 Kitchen serving table.

2 Kitchen work tables.

1 Kitchen work table with flour bins.

1 Kitchen work table with shelves.

1 Copper wash boiler.

3 Granite Kettles.

5 Pot covers.

1 Granite stew pan—large.

1 Enamel stew pan—large.

6 Granite stew pans—small.

6 Enamel stew pans—small.

1 Large iron skillet.

6 Large iron baking pans.

5 Small iron baking pans.

3 Medium iron skillets.

1 Iron pan cake plate.

2 Tin cream buckets.

1 Meat grinder—Enterprise No. 10.

1 Small spring scale.

34 Tin Bread pans.

4 Small skillets.

17 Glass tumblers.
35 Enamel soup bowls.
4 Enamel sugar bowls.
3 Aluminum water pitchers.
4 Enamel milk pitchers.
4 Aluminum syrup pitchers.
25 Table spoons.
46 Table spoons.
46 Tea spoons.
26 Wood handle table knives.
36 Wood handle table forks.
12 Metal handle table knives.
9 Metal handle table forks.
7 Medium size coffee pots.
5 Medium size tea pots.
13 Enamel vegetable dishes.
7Enamel meat platters.
30 China dinner plates.
26 Medium enamel cups.
11 Tall enamel cups.
29 Tin lunch buckets.
1 Granite roaster.
1 Small galvanized wash tub.
6 Granite kettles.
1 Large soup boiler.
2 Clothes wringers.
1 Glass oil lamp.
1 Stone jar—4 gal.
1 Large Galvanized tub.
1 Large iron meat roaster.

1 Large granite coffee pot.
5 Ladles.
4 Large cooking spoons.
1 Egg beater.
2 Dish pans.
1 Fruit strainer.
1 Galvanized bucket.
1 Meat cleaver.
2 Butcher knives.
1 Butcher steel.
1 Heating stove.
8 Double cots.
21 Single cots.
13 Khaki mattresses.
22 Plain mattresses.
1 Heating stove.
2 Iron beds with springs and mattress.
2 Iron cots with one mattress.
1 Bureau.
1 Rocking chair.
1 Dining table.
2 Small tables.
1 Box telephone.
1 Phanstiel Radio—without tubes or batteries.
1 Heating stove.
1 Electric cooking stove.
1 Coal cook stove.
1 Hot water tank with Electric heater.
1 Iron bed with springs and mattress.
2 Iron cots with khaki mattresses.

4 Straight chairs.

1 Iron bed with springs.

1 Wooden table.

1 Coal cook stove.

1 P. H. & F. M. Root Co. Air Blower Size #1, Serial #38122.

2 McIntosh Pneumatic Flotation Cells.

1 Thickener Mechanism 8' x 7'.

1 Oil Feeder.

1 Grizzley.

1 Portland Filter 8' x 8' with Doak Vacuum Pump.

1 Pahrenwald Classifier.

1 Model C Door Duplex Classifier.

1 Marcy Ball Mill.

1 Door Thickener 24' x 6'.

1 U. S. Motor 75 H. P. #17843.

1 Westinghouse Motor 15 H. P. #455104 with Starter, #30150.

1 General Electric Motor 3 H. P. #4989551.

1 Westinghouse Motor 30 H. P. #579472.

1 General Electric Motor 3 H. P. #244734.

1 Westinghouse Auto Starter Style 5877.

1 Westinghouse 5 H. P. Motor #3925759.

1 Cutler-Hammer Auto Starter #91414475.

1 General Electric Auto Starter #456075 with fuse block.

4 Knife switch in mill office on power line.

1 Knife switch in mill office on light line.

1 General Electric oil breaker type Fk20T.

1 Westinghouse auto starter #30151A with knife

switch.

1 Althoff Mfg. Co. Compressor.

1 Nat'l Brake & El. Co. air compressor.

1 Swaby centrifugal pump #2.

6 Union iron works centrifugal pump #2.

1 Dorrco pump #616M filter.

1 Centrifugal pump #1-32A1172.

2 3" rubber belts.

15 4" rubber belts; 1 5" rubber belt.

2 6" rubber belts.

1 7" rubber belt.

1 10" rubber belt.

1 12" rubber belt.

1 14" rubber conveyor belt.

1 5 x 18 Jack.

1 Champion blacksmith forge and hand blower.

1 Vise #624.

1 F. E. Well Sons Co. pipe vise 242.

1 Chain block.

1 Iron wheel barrow.

1 8 gallon burner tank complete with piping.

1 Laundry stove.

1 Electric 2 burner hot plate.

1 Iron bed and springs with 3 mattresses.

1 Galvanized iron wash tub.

1 Analytical balance #31 with weights.

1 Fairbanks Morse 1 H. P. Motor #205628. Direct connected with Swaby Centrifugal Pump size No. 1, Serial #48284.

1 General Electric 15 H. P. Motor #4949377.

1 General Electric 5 H. P. Motor #5036477.

1 General Electric 7½ H. P. Motor #4150795 with Krogh Centrifugal Pump.

1 General Electric 1 H. P. Motor #1170103.

1 Type C Trumbull El. switch #40321.

1 Type C Trumbull El. switch #40323.

1 General Electric starting compensator #201501-404.

1 Type A Trumbull Electric switch #72351C.

1 Gen. Elect. Magnetic switch cat. #365224504.

1 Cutler-Hammer switch #10036H 16.

1 Allis-Chalmers 125 H. P. Motor #115056 with starter.

1 Trumbull Type C El. starter #40354.

1 Trumbull Type A El. starter #72354.

1 Allis-Chalmers 75 H. P. Slip Ring Motor #113229 with Westinghouse Controller.

1 Box telephone.

1 Small rope block and tackle.

1 Wood plane.

1 Steel square.

1 Hammer.

1 Brace.

1 Chain wrench.

2 Jacks.

1 Wheel puller.

1 Bench vise.

6 Copper oil cans, qts.

4 19" Stillson wrenches.

2 20" Stillson wrenches.

2 36" Stillson wrenches.
1 10" Stillson wrenches.
1 Electric drill type N. T. No. 29036.
1 Steel plane.
3 Iron wheel barrows.
1 Toledo No. 2 pipe threader #7654.
1 Toledo No. 1A pipe threader #52072.
1 Trimo No. 2 pipe cutter.
1 Oswego S. 4T.
1 Pipe vise No. 2 Armstrong.
1 Toledo No. 5 pipe threader.
1 Rope block and tackle 2 shives.
1 Yale chain block 1½ ton.
2 12" Crescent wrenches.
1 8" Crescent wrenches.
1 10" Crescent wrenches.
3 Backsaws.
2 Screw drivers.
2 Flue cleaners.
3 10" S. Wrenches.
1 6" S. Wrenches.
2 8" S. Wrenches.
2 10" monkey wrenches.
1 18" monkey wrenches.
1 Pair pliers.
2 Ballpein hammers.
1 Allis-Chalmers centrifugal pump with 100 H. P. Motor.
1 Lead Cable in shaft about 725'.
1 Clock 8 day.

1 14" Cr. Knight leather belt 66' 14".

1 Ogden Iron works mine car.

1 Tonax mine car.

2 Mine cars—rebuilt.

3 100 KVA single phase 60 cycle 2300 to 230-46OV with lightning arrestors, cut outs, etc.

1 Road ditcher.

1 Gen. Elect. 15 H. P. Motor #3772155.

1 Fairbanks Morse 5 H. P. Motor #69359 with Swaby No. 2 centrifugal pump #41640.

1 Westinghouse 30 H. P. Motor #579469.

1 Trumbull Type C elect. switch.

1 Westinghouse elect. auto starter #90851.

1 General Electric 5 H. P. Motor #1343138.

1 24" circular rip saw.

1 36" cut off saw.

3 6" rubber belts.

1 4" rubber belt.

8 Bits.

1 Saw set.

1 Extension bit.

2 42" one man cross cut saws.

1 Auger machine.

2 Peevies.

1 Cant hook.

2 10" Framing chisels.

1 Foot adze.

1 Saw holder.

2 Scoop shovels.

1 Fork.

1 Large anvil.

1 Small anvil with compressed air hammer.

1 Westinghouse auto starter #30151A.

1 American centrifugal blower No. 5.

1 No. 2 little giant stocks and dyes for threading bolts.

1 Set 12 blacksmith tongs.

1 Blacksmith vise.

6 Axes.

8 Single jack hammers.

5 Double jack hammers.

10 Mine shovels.

16 Mine picks.

1 Mattock.

1 Westinghouse 3 H. P. Motor #1471283.

1 Trumbull type C starter #40351.

3 4" rubber belts.

2 Ogden iron works ore car.

1 Grindstone #1 Schofield.

1 Rope block and tackle 2 shives.

1 Gen. Elec. 5 H. P. Motor #4586524 with centrifugal air blower.

1 Trumbull Safety electric switch #723570.

1 Trumbull Type C electric switch #40852.

1 Ore skip.

1 Dodge sedan.

2 Sets enamel ware bowls and pitchers.

1 Large mirror.

1 Large Bedroom mirror.

2 Small bedroom mirrors.

1 Dining table.
1 Oak rocking chair.
4 Straight chairs.
1 Iron bed with springs and mattress.
1 Fiber furniture set—davenport and 2 chairs.
8 Window shades and rods.
1 Electric cooking stove.
1 Howard heating stove.
1 Welding and cutting outfit complete.
1 Desk lamp.
2 Phaman fire extinguishers.
1 Elkhart fire extinguisher.
3 Pyrena fire extinguishers.
4 1 T P Miners lamps—new.
1 Desk telephone.
1 Pair lineman's climbers.
1 Desk chair.
4 Common chairs.
1 Burroughs adding machine.
1 Desk.
2 Steel letter transfer files.
1 Todd protectograph.
1 Steel office safe #5119.
1 No. 5 Underwood typewriter.
2 Heating stoves.
1 Bureau.
1 Rocking chair.
1 Dining table.
2 Electric 2-burner hot plate.
1 Analytical balance #31 with weights.

1 Box telephone.
1 Block-8 day.
1 2" Sand pump.
1 Platform scale.
1 Balance scale.
3 Furnaces.
1 Rail Bender.
1 Surveyors transit.
1 Compressor.
1 Pumping Plant.
1 Kelvinator.
1 Substalin, including 4-150 K. V. A. Transformers.

(Title of Court and Cause)

NOTICE OF REMOVAL OF CAUSE AND FILING OF RECORD IN THE UNITED STATES DISTRICT COURT.

Filed August 24, 1936

TO W. H. LANGROISE, ESQUIRE, and SAM S. GRIFFIN, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF ABOVE NAMED:

YOU ARE HEREBY NOTIFIED That on the 30th day of August, 1936, by an order of the

District Court of the Seventh Judicial District of the State of Idaho, in and for Gem County, the above entitled cause was duly removed from said court to the District Court of the United States for the District of Idaho, Southern Division, and that the transcript of the record in said cause was filed in the said District Court of the United States on the 24th day of August, 1936.

Dated this 3d day of August, 1936.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendants, appearing specially.

COPY RECEIVED and service accepted
this 24th day of Aug., 1936.
SAM S. GRIFFIN
W. H. LANGROISE
Attorneys for Plaintiff.

(Title of Court and Cause)

SUMMONS

Filed Aug. 23, 1937

THE PRESIDENT OF THE UNITED STATES OF AMERICA SENDS GREETINGS TO THE ABOVE NAMED DEFEND-

ANTS, HURON HOLDING CORPORATION AND ALEXANDER LEWIS.

You, and each of you, are hereby notified that an amended complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above named plaintiff, and you are hereby directed to appear and plead to said amended Complaint within twenty (20) days of the service of this Summons; and you are further notified that unless you so appear and plead to said amended Complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said amended Complaint.

WITNESS My hand and the seal of said District Court this 17th day of August, 1937.

(Seal) W. D. McREYNOLDS, Clerk.

W. H. LANGROISE
SAM S. GRIFFIN
Attorneys for Plaintiff,
Residence and Portoffice
Address: Boise, Idaho.

DISTRICT COURT OF IDAHO } ss.
SOUTHERN DIVISION }

I HEREBY certify and return that I received the annexed Summons on the 17th day of August, 1937; that I was unable to find in the district of Idaho any person designated by the Huron Holding Corpora-

tion, a corporation, named as defendant, upon whom process could be served as provided in Section 29-502 Idaho Code Annotated, nor could I find that said Huron Holding Corporation had ever qualified in Idaho nor designated any person within the State of Idaho, upon whom process could be served and I, therefore, served said Summons and a copy of the Amended Complaint upon the said Huron Holding Corporation, a corporation, by handing to and leaving with, Lillian M. Campbell, County Auditor of Gem County, State of Idaho, in which County I was informed said Huron Holding Corporation, defendant, was doing business in the State of Idaho, a true copy of said Summons and a copy of the Amended Complaint in said action, at Emmett, Gem County, Idaho, on the 18th day of August, 1937.

I further certify and return that after due and diligent search I am unable to find the defendant Alexander Lewis within the District of Idaho.

In witness whereof I have hereunto set my hand this 18th day of August, 1937.

GEORGE A. MEFFAN

UNITED STATES MARSHALL

By John H. Glenn

United States Deputy Marshal.

(Title of Court and Cause)

MOTION TO QUASH SERVICE OF SUMMONS AND DISMISS THE ACTION

Filed September 13, 1937

COMES NOW, Defendant, Huron Holding Corporation, a corporation, by its Attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of raising the question of jurisdiction of the court in moving to quash service of summons, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That Huron Holding Corporation is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the said corporation is not now, nor at any other time has it been doing business in the State of Idaho.

II.

That service of summons and complaint in this case was attempted to be made on the defendant, Huron Holding Corporation, a corporation, by personal service thereof on August 18, 1937, on Lillian M. Campbell, Auditor and Recorder of Gem County, State of Idaho, in Gem County, State of Idaho.

That the said Auditor and Recorder above named

so served with summons and complaint, as aforesaid, was not on August 18, 1937, or any other time, and is not now the agent or business agent transacting business for Huron Holding Corporation, a corporation, in the State of Idaho.

That said Huron Holding Corporation, a corporation, was not on August 18, 1937, or at any other time, and is not now doing business in the State of Idaho, and that service of summons and complaint on Lillian M. Campbell, Auditor and Recorder of Gem County, State of Idaho, did not constitute service on the said corporation; that the said Huron Holding Corporation, a corporation, has not been served with summons or complaint in this action in any lawful manner.

III.

That this Honorable Court does not have jurisdiction of the defendant, Huron Holding Corporation, a corporation.

WHEREFORE, Hawley & Worthwine respectfully move that the purported service of summons on the said defendant, Huron Holding Corporation, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 13th day of September, 1937.

HAWLEY & WORTHWINE
Residence: Boise, Idaho.

Attorneys for Huron Holding Corporation, a corporation, appearing specially.

STATE OF IDAHO, } ss.
County of Ada.

OSCAR W. WORTHWINE, being first duly sworn, upon his oath, deposes and says:

That he is one of the attorneys for Huron Holding Corporation, a corporation, and makes this verification for and on behalf of the said corporation for the reason that all of its officers are absent from the County of Ada, State of Idaho, where affiant resides; that the facts set forth in the foregoing motion are within affiant's knowledge; that affiant has read the foregoing motion and knows the contents thereof; and that the facts stated therein are true to his own knowledge.

OSCAR W. WORTHWINE

SUBSCRIBED and sworn to before me this 13 day of September, 1937.

FRANCES HILL

(SEAL) Notary Public for Idaho, Residing at Boise, Idaho.

(Service acknowledged September 13, 1937)

(Title of Court and Cause)

STIPULATION FOR SUBMISSION OF MOTION TO QUASH SERVICE BY DEFENDANT HURON HOLDING COMPANY

Filed Sep. 22, 1937.

IT IS STIPULATED AND AGREED By and between the attorneys for plaintiff and for defendant, Huron Holding Corporation, that the said defendant's Motion to Quash Service of Summons herein filed be, and the same is, submitted to the Court for decision upon said Motion, the records and files of said cause, including affidavits of James L. Fozard, Lester R. Bessell, Alexander Lewis, William I. Phillips and Ralph Shaffer, now on file, and all relevant and material exhibits, depositions, testimony and Bill of Exceptions in the case of Ojus Mining Company, plaintiff, versus Manufacturers Trust Company, and Alexander Lewis, defendants, #1833, Southern Division of the District of Idaho, the same being in the records and files of this Court, all of which foregoing shall be deemed to have been admitted in evidence or testified to in this cause in support of, and in opposition to, said motion.

IT IS FURTHER STIPULATED That the same conditions existed at the time of service of Summons on the County Recorder for Huron Holding

Corporation, as appear from the records, files and papers above referred to.

DATED this 22 day of September, 1937.

SAM S. GRIFFIN
W. H. LANGROISE,
Attorneys for Plaintiff,
Residence: Boise, Idaho.
HAWLEY & WORTHWINE,
OSCAR W. WORTHWINE
Attorneys for defendant, Huron Holding Corporation.
Residence: Boise, Idaho.

(Title of Court and Cause)

ORDER OVERRULING MOTION TO QUASH

Filed September 24, 1937

Upon submission, and after consideration,

IT IS ORDERED, That the Motion to Quash service of Summons filed by the Huron Holding Corporation, a corporation, defendant in the above cause, be, and the same hereby is, denied, and said defendant is granted an exception and sixty days from the date hereof within which to prepare, serve and file Bill of Exceptions.

DATED: September 24, 1937.

CHARLES C. CAVANAH
District Judge.

(Title of Court and Cause)

ANSWER

Filed September 27, 1937

COMES NOW, The Defendant, HURON HOLDING CORPORATION, and for itself alone answering the amended complaint of the plaintiff herein does allege:

I

That this answering defendant is not doing business within the County of Gem, State of Idaho, or at all in the State of Idaho, and has never done business therein and has never been a resident of or within the State of Idaho, and is not subject to the jurisdiction of this court; that service of summons and complaint in this case was attempted to be made upon this answering defendant by service on Lillian M. Campbell, Auditor and Recorder of Gem County, in the County of Gem, State of Idaho; that said Auditor and Recorder was not on that date, or at any other time, and is not now the agent or business agent transacting business for this answering defendant in the State of Idaho; that this answering defendant has not been served with summons and complaint in this action in the manner required by the laws of the State of Idaho, and, therefore, is not within the jurisdiction of this court, all in violation of the Constitution of the United States of America, and particularly the 14th Amend-

ment thereto which provides that no state shall deprive any person of property without due process of law nor make or enforce any law which shall abridge the priveleges or immunities of a citizen of the United States.

II.

This answering defendant denies the allegation set forth in paragraph II of said complaint, that for more than a year last past and now the said defendant is and was doing business within the County of Gem, State of Idaho.

III.

This answering defendant denies the allegations set forth in paragraphs III, IV and VI of said complaint.

IV.

For affirmative defenses this answering defendant alleges:

(a) That the plaintiff, if it ever had any right, title or interest in and to the property described in the said complaint, or any part thereof, did voluntarily abandon and surrender both the title and possession thereof more than three years prior to the date of the commencement of this action.

(b) That the plaintiff's cause of action is barred by the provisions of Sections 5-201 and 5-218 Idaho Code Annotated, which provides that a civil action can only be commenced for taking, detaining or in-

juring any goods or chattles, including actions for the specific recovery of personal property within three years before the cause of action accrues.

This defendant alleges that the cause of action if any the plaintiff ever had, accrued about the 25th day of April, 1933, and more than three years prior to the date of the commencement of this action, and, therefore, it is barred by the provisions of said statute of limitations of the State of Idaho.

WHEREFORE, the defendant prays judgment of this court:

(1) Dismissing the action on the ground that this court has not lawfully acquired jurisdiction thereof.

(2) That under the provisions of the 14th Amendment of the Constitution of the United States due process of law has not been had against the defendant, and its privileges and immunities have been abridged.

(3) That the Plaintiff has abandoned any title to or possession of the property described in the said complaint.

(4) That the plaintiff has not begun its action within the period prescribed for the commencement of action in the State of Idaho, and is barred by reason of the provisions of the statute of limitations of the State of Idaho.

(5) That the plaintiff take nothing by reason of its complaint and that this defendant shall be awarded

judgment for costs and disbursements herein incurred.

HAWLEY & WORTHWINE
Residence: Boise, Idaho,
Attorneys for Defendant, Huron Holding Corporation, a corporation, appearing specially.

(Duly verified.)

(Service Acknowledged September, 1937.)

(Title of Court and Cause)

STIPULATION

Filed Feb. 28, 1938.

IT IS STIPULATED AND AGREED That the following are facts, and, without objection, may be read and admitted in evidence upon the trial of the above entitled cause with the same effect as though testified to, or otherwise shown, by competent evidence therein.

Each of the defendants, Manufacturers Trust Company and Huron Holding Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York. Neither corporation has ever complied with the laws of the State of

Idaho, relating to, or required thereby for, the doing of business in Idaho by foreign corporation, and neither has, or has had, any designated person actually residing in Gem County, Idaho, or elsewhere in Idaho, upon whom process can be served as provided by the laws of Idaho.

On April 25, 1933, Jess Hawley put Gordon Smith in charge of said mine for the owner or owners thereof, and under the latter's direction one W. A. Harvey made, between April 27, and May 8, 1933, an inventory of personal property then on, at, in such mine, and includes property owned by plaintiff and defendants, a copy of which inventory is hereunto attached (except that penciled writing and check marks are not a part thereof) and may be introduced in evidence without further identification and without objection.

IT IS FURTHER STIPULATED AND AGREED That any and all proof, either by way of exhibits or oral testimony taken in connection with, or admitted in evidence in, an action heretofore pending in the above entitled Court for the District of Idaho, Southern Division, No. 1833, entitled Ojus Mining Company, a corporation, plaintiff, vs. Manufacturers Trust Company, a corporation, and Alexande Lewis, defendants, as the same may appear in the records and files of this court, or in the bill of exceptions appearing in the transcript of record in the Supreme Court of the United States in Ojus Mining Company, a corporation, petitioner, vs. Manufacturers

Trust Company, a corporation, and Alexander Lewis, respondents, or the reporter's transcript of testimony prepared by Leo Hamilton, may be used, read and admitted in evidence herein without further identification or offer, subject only to objections as to materiality or relevancy, with the same force and effect as though the witnesses were called herein, sworn, and testified in person herein.

W. H. LANGROISE
E. H. CASTERLIN
SAM S. GRIFFIN
Attorneys for Plaintiff, Lincoln Mine Operating Company, a corporation.

JESS HAWLEY
HAWLEY & WORTHWINE
Attorneys for defendants, Manufacturers Trust Company, a corporation, and Huron Holding Corporation, a corporation.

(Title of Court and Cause)

VERDICT

Filed March 3, 1938

We, the jury in the above entitled case, find for the plaintiff and assess its damages against the de-

fendant Huron Holding Corporation, in the sum of $6730.70.

CARL BEESON,
Foreman.

(Title of Court and Cause)

MINUTES OF THE COURT OF FEBRUARY 28, 1938

This cause came on for trial before the Court and a jury as to the defendants Manufacturers Trust Company, a Corporation, and the Huron Holding Company, a corporation, said defendants being represented by their counsel Jess B. Hawley, Esquire, and the plaintiff being represented by Messrs. W. H. Langroise and E. H. Casterlin. It was announced by counsel that the defendant Alexander Lewis was now deceased and that a disclaimer had been filed by and on behalf of the defendant Fred Turner.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. Ben S. Eastman, J. W. Duquette and R. E. Newhouse whose names were so drawn, were excused on the plaintiff's peremptory challenge; and Fred Bailey and Ralph E. Leighton, Sr., whose names were likewise drawn, were excused

on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to-wit:

Lester Moulton
Claude C. Trobaugh
W. H. Langford
Clyde Dunn
W. O. Patterson
James W. Franklin
Mark Johnson
Simon Lind
Gaylord R. Roberts
Carl Beeson
B. F. Car
Floyd Commings

A statement of the plaintiff's case by its counsel was made and a stipulation of facts was entered into by counsel for the respective parties.

Elmer W. Fox was sworn and examined as a witness and documentary evidence was introduced on the part of the plaintiff.

After admonishing the jury, the Court excused them to ten o'clock A. M. on March 1st, 1938, and continued the trial to that time.

(Title of Court and Cause)

MINUTES OF THE COURT OF MARCH 1, 1938

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Elmer W. Fox was recalled and further examined and William I. Phillips, George Shafer, Fred Turner and J. E. Parson were sworn and examined as witnesses and other evidence was introduced on the part of the plaintiff.

Further trial of the cause was continued to ten o'clock A. M. on March 2, 1938, and the members of the jury were excused to that time.

(Title of Court and Cause)

MINUTES OF THE COURT OF MARCH 2, 1938

The trial of this cause was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

J. E. Parson and Fred Turner were recalled and

further examined and F. J. Arnold was sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff and here the plaintiff rests.

Fred Turner, W. A. Hooper and J. L. Fozard were sworn and examined as witnesses on the part of the defendants.

Whereupon the Court excused the jury to ten o'clock A. M. on March 3rd, 1938, and continued the trial to that time.

(Title of Court and Cause)

MINUTES OF THE COURT OF MARCH 3, 1938

Counsel for the respective parties being present, the trial of this cause was resumed before the Court and jury. It was agreed that the members of the jury were all present.

The defendants' counsel announced that the defendants rested, and here both sides close.

The defendants' counsel moved the Court to dismiss the action as to each of the defendants. After hearing argument of the respective counsel on the motion, he announced his conclusions thereon, sustaining the motion and dismissing the action as to the defendant Manufacturers Trust Company, a corporation, and

denying said motion as to the defendant Huron Holding Corporation. It was ordered that the action be, and the same hereby is dismissed as to the defendant Fred Turner. The defendant Alexander Lewis being deceased and no service having been made on said defendant, the Court announced that the trial would continue as between the plaintiff and the defendant Huron Holding Corporation. Exceptions were asked and allowed.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict.

On the same day the jury returned into court, the counsel for the respective parties being present, the jury presented their written verdict, which was in the words following:

(Title of Court and Cause.)

"We, the jury in the above entitled case, find for the plaintiff and assess its damages against the defendant Huron Holding Corporation, in the sum of $6730.70.

Carl Beeson, Foreman."

The verdict was recorded in the presence of the jury and then read to them, and they each confirmed the same.

The defendant, Huron Holding Corporation, asked and was granted sixty days in which to prepare serve and lodge proposed bill of exceptions.

(Title of Court and Cause)

JUDGMENT

Filed March 3, 1938

This action came on regularly for trial, said parties appearing by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action and witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names and presented their written verdict, as follows:

(Title of Court and Cause.)

"We, the jury in the above entitled case, find for the plaintiff and assess its damages against the defendant Huron Holding Corporation, in the sum of $6730.70.

Carl Beeson, Foreman."

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff have and recover from said defendant, the Huron Holding Corporation, the sum of Sixty-seven Hundred Thirty and 70/100 Dollars ($6730.70), with interest thereon from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $79.42.

WITNESS The Honorable Charles C. Cavanah, Judge of said Court, and the seal thereof this 3rd day of March, 1938.

(SEAL) W. D. McREYNOLDS, Clerk

(Title of Court and Cause)

BILL OF EXCEPTIONS.

Filed August 9, 1938

BE IT REMEMBERED that the above entitled cause came on to be heard before the Honorable Charles C. Cavanah, District Judge, sitting with a jury at Boise, Idaho, commencing February 28, 1938, upon issues drawn by plaintiff's amended complaint and the answers of the Manufacturers Trust Company, a corporation, and Huron Holding Corporation, a corporation, thereto; William H. Langroise and Erle H.

Casterlin appearing as attorneys for the plaintiff, and Hawley & Worthwine by Jess Hawley appearing as attorneys for the defendants. Whereupon, after the plaintiff's opening statement, the parties agreed and stipulated in open court that each of the defendants, Manufacturers Trust Company and Huron Holding Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York; neither corporation has ever complied with the laws of the State of Idaho relating to, or required thereby, for the doing of business in Idaho by foreign corporations; neither is legally entitled to do business in Idaho, and neither has or has had any designated person actually residing in Gem County, Idaho, or elsewhere in Idaho, upon whom process can be served as provided by the laws of Idaho; that on April 25th, 1933, Jess Hawley put Gordon Smith in charge of said mine for the owner or owners thereof and under the latter's direction one W. A. Harvey made between April 27th and May 8th, 1933, an inventory of personal property then on, at, in or used in connection with such mine and included property owned by plaintiff and defendant, which inventory is plaintiff's Exhibit 1, except that penciled writing and check marks are not a part thereof, and may be introduced in evidence without further identification, and without objection.

Whereupon, Exhibit No. 1 was introduced in evidence by the plaintiff.

"MR. HAWLEY: We have no objection if it be understood that the Harvey inventory includes not only the property of the Lincoln Mines Operating Company but property owned by the other defendant, as well. Roughly speaking, we sometimes call it the 'Lincoln Mines Property,' but that includes all the property on this property, and with the understanding that it is not admitted that this inventoried property belongs to the Lincoln Mines Operating Company. I think that was understood in the stipulation. We have no objection.

"MR. LANGROISE: That is as the stipulation shows, and is a fact.

"THE COURT: Admitted."

"MR. HAWLEY: We will admit a large amount of work by the Lincoln Mines while it held the lease. We will admit that a second and entirely different lease, which was given to Mr. Phillips, was assigned to Ojus. We will admit considerable work done by Ojus. I understand all this type of testimony goes entirely to the question of whether either the Manufacturers Trust Company was doing business in this state, or whether the Huron Holding Corporation was doing business in this state. The Huron Holding Corporation was not brought into this case until September, 1937, when it was brought in by amendment. We will admit that there was a refusal to turn

over any of the personal property which belonged to the Lincoln Mines Operating Company at any time on June 4th, 1936, and that continued until the 15th of October, 1937, at which time denial of the right of the Lincoln Mines Operating Company was withdrawn to any property that the Lincoln Mines Operating Company, plaintiff in this suit, had on June 4th, 1936, which was situated on the Lincoln group of claims. We will admit that any technical claims we may have made to that property in pleadings on account of abandonment, of the statute of limitations will be withdrawn. I think that the case can be shortened very much in that way.

"MR. CASTERLIN: May it be admitted that in the West view Mining District, Gem County, Idaho, is a group of mining claims commonly known as the Lincoln Mines, which is the mining property so far as real estate is concerned which will be mentioned in this trial?

"MR. HAWLEY: That is admitted."

"MR. CASTERLIN: May it be admitted and, do you agree, that on July 30th, 1923, the Columbia Bank, a New York corporation, which was thereafter merged into the defendant Manufacturers Trust Company, made a loan of $125,000 to the Industrial Bond & Finance Corporation, a corporation, which loan was evidenced by a note for that amount, executed by such latter

corporation.

"MR. HAWLEY: That is true."

"MR. HAWLEY: We will admit that the Industrial Loan & Finance Company borrowed $100,000 for the purpose of paying it to the Pacific National Bank for a deed which J. H. Richards and others had given an option to buy, that the $100,000 was sent by the Columbian Bank to the Pacific Bank at Boise, Idaho, and the deed which was in escrow and was on payment on the $100,000 to be delivered. The deed was sent to the Columbian Bank. It was a deed in blank, with the right when payment of the money was made to fill in the grantee, and that when the deed was received in New York the bank notified the company; that the company refused to take it,—

"MR. CASTERLIN: —You mean who, by the 'company'?

"MR. HAWLEY: The Industrial Bond & Finance Company refused to take the deed, and claimed that its Board of Directors had not authorized its officers to buy the Lincoln group, and had not authorized them to give the $100,000, and the $21,000 notes, respectively, to the bank, and thereupon no action was brought by the Columbia Bank against the Industrial Loan & Finance Company, and the bank then fell heir to the property. It had the deed.

"MR. CASTERLIN: Which bank?

MR. HAWLEY: The Columbia Bank, and shortly after this happened the Columbia Bank merged with the Manufacturer's Trust Company, and as a part of the assets which were included in the merger, were the notes of the Industrial Bond & Finance Company, and the deed to the Lincoln group of mines, and the Manufacturers Trust Company, having this deed, with the name of the grantee blank, then filled in the name of one of their employees, Alexander Lewis, and recorded the deed so that the legal title to the Lincoln Group of mines was in Alexander Lewis, but he had no beneficial interest whatever, and was not interested financially at all, and was holding title purely and solely for the Manufacturers Trust Company, which was the beneficial owner and there has never since then been any deed issued by Alexander Lewis to the property, and that he died in December, 1937.

"MR. CASTERLIN: The statement you have made we agree to."

It is agreed that Alexander Lewis made and executed a deed in which the name of the grantee was left blank in February, 1927, admitted in evidence as Exhibit 2, and delivered it to the Manufacturers Trust Company, and it was in that company's possession until February, 1933, and from that time on in the possession of the defendant, Huron Holding Corporation. On December 6, 1924, the notes for $100,000.00

and $21,000.00 were repudiated by the Industrial Bond and Finance Company. They were disputed paper and were not assets which a bank was allowed to carry and were taken out of the bank's assets. This would show on the profit and loss account. The notes were held for whatever value they had. At the time that Alexander Lewis' name was inserted in the deed he was in the employ of attorneys for the Manufacturers Trust Company and until 1935 was such an employee but not an officer. In 1935 he quit the employ of said Manufacturers Trust Company and entered into other employment where he remained until his death in 1937. He signed papers including the Dorman option, later assigned to the Lincoln Mines Operating Company, and an option to Mr. Phillips, later assigned to Ojus Mining Company, and he signed all papers which the Manufacturers Trust Company requested him to do, and he made no other conveyance except the deed above referred to in blank, being Exhibit No. 2.

Prior to 1932 the Industrial Bond & Finance Company was dissolved by the State of New York for nonpayment of franchise taxes. On February 9, 1932, there was a merger of the Chatham and Phenix Bank with the defendant, Manufacturers Trust Company, and on that date the defendant, Huron Holding Corporation, was incorporated to take over from the merging banks various of their assets in amount approximately 20 million dollars, which assets were written off or doubtful and were not permitted under the

banking laws to remain in the bank as assets. The Huron Holding Corporation took title to these securities and gave therefor to the merging bank and the Manufacturers Trust Company four million dollars in debentures bearing six per cent, which are a first lien on the 20 millions of assets. The common stock of the Huron Holding Corporation was issued directly to the shareholders of the merging banks, share for share. Each shareholder in either bank got a share of common stock of the Huron Holding Corporation in proportion to their holdings. The officers and directors of the Huron Holding Corporation were all officers or directors of the Manufacturers Trust Company, excepting the President of the Huron Holding Corporation, who was neither an officer nor a director of the Manufacturers Trust Company. The only instrument of direct conveyance of the assets of the merged banks, the Chatham-Phenix and the Manufacturers Trust Company is Exhibit No. 3. From February, 1923, to February, 1932, the defendant, Manufacturers Trust Company, was the legal owner of the Lincoln Mines, and since February 9, 1932, the Huron Holding Corporation has been the holder, and since February 9, 1932, the Huron Holding Corporation has claimed beneficial ownership of the Lincoln Mines by reason of the said assignment and the acquiescence of the Manufacturers Trust Company. The only instrument of direct conveyance of any interest in the Lincoln Group of mines to the Huron Holding Corporation is the assignment.

The Huron Holding Corporation was organized and its business was the liquidation of the assets taken over, including the two notes referred to, the assets described in Exhibit No. 3, of which only the two notes of the Industrial Finance and Bond Corporation and the Lincoln group of mines are in Idaho. There is an agreement in writing between the Manufacturers Trust Company and the Huron Holding Corporation, under which the former is the managing agent of the latter and utilizes its facilities in such managing, charging the costs and expenses thereof to the Huron Holding Corporation. On March 25, 1926, the Manufacturers Trust Company negotiated and in the name of Alexander Lewis executed a lease of the Lincoln Mine to Henry Dorman which is Exhibit No. 5 admitted in evidence, and afterwards that lease was assigned to the Lincoln Mines Operating Company which undertook to carry on its terms until October, 1929, at which time they defaulted in performance, and following the default gave a quitclaim deed to Alexander Lewis for the Manufacturers Trust Company of the Lincoln Group of Mines and the property at that time belonging to the Manufacturers Trust Company and standing in the name of Alexander Lewis for and on behalf of the Manufacturers Trust Company. The plaintiff expended under the Dorman lease during the time it was operating under that lease $195,000 and produced ore of the value of less than $25,000, and in the course of the operations the plaintiff added to the mill and flotation system which was owned by Mr. Lewis, sunk

shaft, drove tunnels and drifts, did exploration work, and operated the mill on ore from the mine. There was machinery on the mine belonging to Alexander Lewis and the Manufacturers Trust Company. During the operation under the Dorman lease, the plaintiff employed an average of 25 men at the mine and mill. When operations of the plaintiff ceased under the Dorman lease, the plaintiff left certain personal property on the Lincoln Group of Mines. The plaintiff left the personal property on the Lincoln Group of Mines and made no claim to it for many years. At this point Exhibit No. 7 was admitted in evidence. This is a lease dated November 21, 1931, between Alexander Lewis, lessor, and William I. Phillips, lessee, by which the former leases and options for the sum of $200,000.00 to the latter the Lincoln group of mining claims.

At this point Exhibit No. 8 was admitted in evidence, which is a lease dated June 15, 1932, from William I. Phillips to Mr. J. Lawrence Gilson, Vice President of the Manufacturers Trust Company transmitting an inventory of equipment covered by the contract with Alexander Lewis, which inventory is as of June 13, 1932. This inventory described the property owned by Mr. Lewis.

In 1931 Alexander Lewis got, in his own name but for the use and benefit and at the sole expense and direction of the Manufacturers Trust Company, U. S. patent for lode mining claims which became a part of the Lincoln group of mines and in this connection,

Mr. Lewis made discoveries, staked, surveyed and did other necessary work in connection with obtaining the said patents. The lease of 1931 made by Alexander Lewis for the Manufacturers Trust Company to William I. Phillips was assigned by him to the Ojus Mining Company which proceeded to do mining work on the Lincoln Group and extracted ore therefrom of the value of less than $7,000, and during its operation used, whether with or without the consent of the Lincoln Mines Operating Company is not stipulated, certain personal property which the plaintiff had left on the Lincoln Group of Mines when it gave up its lease in 1929. The Ojus continued in possession of the group of mines under the Phillips option until April, 1933.

"MR. CASTERLIN: May it be agreed on April 25th, 1933, you, Mr. Hawley, acting for the owners of the Lincoln Mines, took possession of the Lincoln Mines with the consent of the Ojus Mining Company, as attorney for the owner of the Lincoln Mines took possession, —

"MR. HAWLEY: —Yes, you mean the Lincoln group of mines?

"MR. HAWLEY: This is a claim and delivery suit, and they are entitled to recover the property which belongs to the plaintiff, together with such damages as the court will instruct the jury on that point. We have admitted for the purpose of this case and record that there was a detention of whatever property the Lincoln Mines Operating Company owned in June

1936. There was a detention of that until October, 1937. At the time the Ojus gave up possession there was on the group of mines mining and milling equipment, assay office equipment, housing fixtures and furniture belonging to the Ojus Mining Company.

At this point, Exhibit No. 9 was admitted in evidence. This exhibit consists of a number of checks, all drawn by the American Smelting and Refining Company, in favor of Alexander Lewis, in care of the Manufacturers Trust Company and endorsed by Mr. Lewis to the order of the Manufacturers Trust Company. The first check is dated October 26, 1932, for $343.26; the second is dated December 14, 1932, for $400.70; the third is dated January 5, 1933, for $738.13; the fourth was dated April 7, 1933, for $327.47. The beneficial owners of the Lincoln Group and the Lincoln Mines Operating Company and the said ownership continues in the respective parties. Between May 1, 1933, and July 1, 1933, when Berthelson was in charge of the Lincoln Mines, he with a crew of some 10 to 20 men, about an average of 15, did work on the Lincoln Mine by way of cross cutting, drifting and doing general mining work for the owner or owners of the property. This work consisted of working in the tunnels, blasting, running out muck, attempting to discover ore, development work on the claims for the purpose of finding ore. In doing this work Berthelson and his men used some of the personal property left by the Lincoln Mines Operating Company. From July 1, 1933, to the present time

the owners of the Lincoln Mine have kept two men, one of them, Fred Turner, employed on the Lincoln Mine. On June 4, 1936, Mr. Phillips, President of the Lincoln Mines Operating Company, and his counsel, Mr. Langroise, went out to the Lincoln Mine and demanded from Mr. Turner who was employed by the Huron Holding Corporation, the personal property, without specifying it, which they said belonged to the plaintiff. Mr. Turner said he had no authority to turn over any property.

"MR. HAWLEY: I think that my previous statement which I made at the opening of Court, that they, and each of them, insofar as they may have made any claim to property on the Lincoln Mines from June 4th, 1936, —property of the Lincoln Mines Operating Company, personal property, from June 5th, 1936, and refused delivery of possession thereof; that they have withdrawn that claim, and on October 16th, 1937, agreed to deliver all property owned by the Lincoln Mines Operating Company to it.

"MR. CASTERLIN: That was in 1937.

"MR. HAWLEY: October 15th, 1937, the date when the defendant agreed to deliver or permit the plaintiff to take his property, whatever property it owned, off the Lincoln group.

"MR. CASTERLIN: At the time in 1937 when you offered to deliver possession of the per-

sonal property to the Lincoln Mines Operating Company, did you at that time specify any particular property which you would deliver to them?

"MR. HAWLEY: No; we just agreed to give them any property they owned, whatever of their property was there.

"MR. CASTERLIN: At that time was any offer of any items made?

MR. HAWLEY: No, just all the property that the Lincoln Mines Operating Company owned. Is there any question about that?

"MR. CASTERLIN: No, I think not."

ELMER FOX, called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

My name is Elmer Fox. My business is certified public accountant. I have engaged in that business in Boise since July, 1927. I was employed by the plaintiff to audit its accounts and expenditures from the time of its organization up until July 31, 1927. I set up an accounting system for the Lincoln Mines and made periodical audits until December 10, 1929, the date of my last audit. On a number of occasions I audited the plaintiff's books. I had those books in my possession or access to them until the date of my last audit report. The books are now in my possession. The plaintiff spent in the purchase of machinery and equipment, erection of buildings, repair of build-

ing, development and operation of the Lincoln Mine something in excess of $300,000. I have obtained from the Ojus Mining Company's files invoices of all equipment purchased by it while it operated with slight exception and they are all included in Exhibit No. 11, admitted in evidence, with the exception of two small items amounting to $209.00 which I cannot locate.

I have examined Exhibit No. 1, Exhibit No. 8 and Exhibit No. 12 for identification. Exhibit No. 12 is a copy of the so-called Harvey inventory, plaintiff's exhibit No. 1, with a partial removal of the items shown to have been owned by Lewis as shown by plaintiff's exhibit No. 8. I am able to take plaintiff's exhibit No. 12 and remove from it any items that are owned by Lewis or purchased by the Ojus Mining Company.

"A. On page No. 4 of plaintiff's exhibit No. 12, marked for identification, it shows, 'One Ainsworth button balance,'—this indicates the list in various sections of this inventory, and this would come under section No. 6

"Q. You referred to one Ainsworth button balance?

"A. Yes, sir; that is on the Lewis inventory.

"Q. Now, will you indicate that in some manner on the exhibit?

"A. On this exhibit No. 12?

"Q. Yes, on the exhibit you hold.

"A. Yes; I have indicated it on this sheet.

"Q. Now, go ahead.

"A. Under section No. 7 there was 'one belting, 54½ inches long, repossessed by the Baxter Foundry,' which is on the invoice of the Ojus Mining Company.

"Q. And will you indicate that?

"A. Yes; I have indicated that with a red 'O'.

"Q. Eliminate that by drawing a line through that item, and leaving the letter 'O' as indicated.

"A" Yes; I have done that.

"Q" The letter 'O' will indicate the reason for doing so?

"A. Yes.

"Q. Now, go ahead.

"A. Under section 10 there is listed, 'One Chicago Pneumatic Tool Company two-stage air compressor, No. 1721, size 19 by 12 inches, by fourteen inches,' which is on the Lewis inventory.

"Q. And by the 'Lewis Inventory,' you mean plaintiff's Exhibit No. 8?

"A. Yes, sir.

"Q. I will ask you now to indicate by a letter 'L' in front of that item, and then draw a red line through the item itself.

"A. I have done that.

"Q. Now, go ahead.

"A. Under section No. 18 of this exhibit, there is shown 'Three ore cars,' and 'Two Ore cars,' 15.5 cubic feet capacity, a total of five ore cars, which

are shown on the Lewis inventory, which lists only four mine cars.

"Q. Now, Mr. Fox, please bracket the two items of ore cars, and place to one side the letter 'R' and the figure 'four' to one side.

"A. I have marked it 'Four Lewis.'

"Q. All right. Now, go ahead.

"A. Under Section 19, there is listed, 'One W.L.E. Gurley surveyor's transit,' which was purchased by the Ojus Mining Company.

"Q. Indicate that by showing a letter 'O' to the left and drawing a line through the item itself.

"A. I have.

"Q. Now, go ahead.

"A. Under section 22, there is shown 'one American Scale Company platform six hundred pound capacity. No. 9897,' which was purchased by the Ojus Mining Company.

"Q. Please mark the letter 'O' off to one side and draw a line indicating that was purchased by the Ojus Mining Company.

"A. I have.

"Q. Now, continue.

"A. Under the same section, it lists, 'One grind stone, angle iron frame, and double treadle, 'which is on the Lewis inventory.

"Q. Please place the letter 'L' on the left side and draw a line through it.

"A. I have done that. Now under section No. 27 there is listed, 'one Jim Crow rail bender, two

inch spread of hooks, Baxter Foundry attachment,' which was purchased by the Ojus Mining Company.

"Q. Have you placed the letter 'O' to the left and drawn a line through that?

"A. I have.

"Q. Now, the next item?

"A. Under section 28, the fourth item is 'one General Electric Company induction motor, No. 112048, 52 horse power,' which is on the Lewis inventory.

"Q. That description shows the number, does it?

"A. Yes; the number is 112048, 60 cycles, 440 volts.

"Q. Place the letter 'I' to the left side, and draw a line through it.

"A. I have. And under section No. 35, is listed 'one Cameron steam pump, No. 1204.' Under one inventory I had of the Lewis property back in 1929 it shows a Cameron steam pump, but there was considerable repairs to that pump by the Lincoln Mines Operating Company, and it does not appear on plaintiff's exhibit No. 8.

"Q. Will you change that and instead of 'steam pump,' make it 'one Cameron sinking pump.'

"A. Yes, sir.

"Q. Now, Mr. Fox, will you indicate to the left of that item the letter 'I'? Maybe we can save a little time here,—

"MR. LANGROISE: We will agree at the time of the taking of the inventory of the Lewis property of which exhibit No. 8 is a copy, that the Cameron sinking pump was off the property, but was subsequently returned to the Ojus Mine, and is listed in the Harvey inventory.

"MR. HAWLEY: And it should be marked the same as the others, and taken out.

"MR. LANGROISE: Yes.

"MR. HAWLEY: Sure. We will agree to that.

"Q. (By Mr. Langroise;) Now, would you remove the last sheet? Please remove that sheet.

"A. Yes.

"Q. Now, then, so far as exhibit No. 12 is concerned, for the purpose of identification, does it now contain any of the items as shown by the Harvey inventory of 1933, which appears upon the Lewis inventory, or which the Ojus Mining Company purchased?

"MR. HAWLEY: We will object to that last statement or question as calling for a conclusion of the witness.

"MR. LANGROISE: We will withdraw the question. At this time I offer in evidence the inventory which has been marked for identification as plaintiff's exhibit No. 11, or rather, those are invoices, and not an inventory.

"MR. HAWLEY: May I ask the witness a question?

"THE COURT: You may do so.

"Q. (By Mr. Hawley:) You had nothing to do with buying the articles set forth in the various invoices included in exhibit No. 11?

"A. No, sir.

"Q. (By Mr. Hawley:) And you had nothing to do and knew nothing about their accuracy?

"A. I have verified the records of the Ojus Mining Company, and I know that the invoices are on the books of the Ojus Mining Company. That is all I did.

"Q. (By Mr. Hawley:) And you don't know whether this machinery was on the Lincoln Mines group, that is, you don't know about the actual stuff?

"A. The actual physical condition; no, sir, but they were charged for on the Ojus books.

"THE COURT: He is testifying now as to what the books show.

"MR. HAWLEY: I object to these as they are not identified.

"THE COURT: That calls for the books.

"MR. LANGROISE: These are the original invoices from which the books were made.

"THE COURT: Yes; that is true. The objection will be over-ruled.

"MR. HAWLEY: Exception, please.

"Q. (By Mr. Langroise:) Now, Mr. Fox, have you taken the invoices of the Ojus Mining Company which consists of plaintiff's exhibit No. 11,—have you eliminated from plaintiff's exhibit No. 12, for the purpose of identification, all of the items of equipment shown by these invoices from that exhibit? I mean, have you eliminated them from exhibit No. 12?

"A. With one possible exception.

"Q. Will you indicate that possible exception?

"A. On plaintiff's exhibit No. 11 there is a bill and it contains a charge for air receivers. The dimensions of the air receivers shown on that invoice do not correspond with the air receivers under Section 1 of exhibit No. 12 for identification, but there is one which is very close to the same size.

"Q. Now, the one that is very close to the same size, will you indicate it by placing a letter 'O' to the left of that item, and draw a line through it eliminating it so that there will be no question?

"A. I have done that.

"Q. Now, directing your attention to the heading on No. 14, and directing your attention to 'one Denver jack-hammer No. 18090,' will you draw a red pencil line through that?

"A. Yes.

"Q. Now proceed to the next under item No. 15, which lists a Gardner Denver Leyner drifter model, rented from the Missouri Mine. Will you draw a red lead pencil line through that?

"A. All right.

"Q. Now then, going to item numbered 16, which lists one Gardner Denver model No. 778 stopper, draw a red line through that.

"A. All right.

"Q. And the next item, 'Denver Rock drill stopper,' draw a red line through that.

"A. Yes, sir.

"Q. Now you have drawn a red line through each of those items?

"A. Yes.

"Q. Now, directing your attention to the item under No. 18,—no, that is number 17, which is the last item under No. 17, which is '10 foot conveyor chain, will you draw a red line through that?

"A. Yes, sir.

"Q. You have done so?

"A. Yes, sir.

"Q. Now turning to No. 33, directing your attention to the pulleys, the steel split pulleys, and calling your attention to the last item which is 'one steel split pulley, fourteen inches diameter by six inch face, I will ask you to draw a red line through that.

"A. Yes.

"Q. Now then, directing your attention to the item under No. 37, being under the heading of 'steel sharpening equipment,' there is listed there as the last item 'one Gardner Denver drill sharpener, model 3, complete with dies and dollies.'

"A. I have that item.

"Q. Will you draw a red line through that?

"A. All right.

"MR. LANGROISE: For the purpose of the record I will say the ones we are asking to have a line drawn through that the Lincoln Mines Operating Company will make no claim to these in the process of this litigation."

"Q. (By Mr. Langroise:) Mr. Fox, again directing your attention to what has been marked as exhibit No. 12 I will ask you to turn to item No. 27, and calling your attention to the two items, which are listed as 'one 50-foot machine air hose,' and 'one 40-foot machine air hose,'

A. Yes, I have them.

Q. Take a pencil and draw a line through those two items.

A. I have done so.

Q. Also directing your attention to items under the same number, heading No. 27, turning back to the other page, I will ask you to draw a line through the item marked 'one 4-foot cross bar without cap for jack screw,' and also 'one arm and clamp for cross bar,' and 'one four foot

cross bar, complete.'

A. All right.

Q. Have you done that?

A. Yes, I have.

Q. And directing your attention to your report which has been referred to, have you another copy of that report that you gave Mr. Hawley a copy of yesterday?

A. Yes, sir.

Q. And will you get that?

A. Yes, sir.

Q. Mr. Fox, calling your attention to December 10th, 1929, I believe that you made an audit of the Lincoln Mines accounts or books?

A. I did.

Q. I wonder if you will tell the Court and jury the amount shown by the books of that corporation as having been spent by that corporation in the development, purchase of equipment, repairs to buildings, construction of new buildings and roads, etc., in connection with the Lincoln Mine.

MR. HAWLEY: We object to that as incompetent, irrelevant and immaterial.

THE COURT: You are not objecting on the ground it is not the best evidence?

MR. HAWLEY: That is not the objection.

THE COURT: Over-ruled.

MR. HAWLEY: Exception.

A. The total development cost up to that time, that is, the development of the mine property itself was $230,919.55, from which at that time I deducted the amounts received from concentrates and crude ores shipped, and the profit on the boarding house operations in a total amount of $19,235.71, leaving a net charge of development of $211,683. 84.

Q. Now, Mr. Fox, will you give the amount of the equipment and machinery account?

MR. HAWLEY: I will object to that as incompetent, irrelevant and not material. I insist, —as far as the machinery and equipment is concerned, I insist on the best evidence, and also that it is not shown that is the machinery and equipment that was on the property on June 4th, 1936.

MR. LANGROISE: It is offered to show the extent of the operations, the amount of money spent under the terms of the liease they had. It is segregated, one to mining development, and to machinery and equipment, and the various accounts for the purpose of keeping books.

THE COURT: Not for the purpose of tracing the equipment?

MR. HAWLEY: We have made no question about the fact that while the Lincoln Mines Operating Company was there they spent a great

deal of money, and that is for the purpose of showing that a considerable amount of mining development work was being done, which is relelevant only to show that the owner of the property was doing business in Idaho, and to go into details is not material and is not relevant. The fact that a lot of money was spent is all that seems necessary, without going into detail, which would be misleading, and it could serve no purpose. Would it make any difference to your Honor in determining whether they were doing business in the State of Idaho, if you knew what the total was, instead of having the details? This detail adds nothing to the statement. It states that the gross amount was an amount of some three hundred thousand dollars which was spent, and now to put in an itemized statement would require a considerable amount of testimony as to what machinery and equipment was put in, and so far as the testimony is concerned, as to assisting the Court in determining whether they were doing business in Idaho, I think that would be of no assistance.

MR. LANGROISE: I am not offering it for the purpose of showing the amount expended for machinery that the defendants have of the plaintiff's, but I am offering it to show the amount of money spent in the different phases, and that is material. I am not going into detail; I am not offering it as proof of ownership, as to value of

equipment which the defendants have that belongs to the plaintiff. I am merely seeking to segregate the various general heads, and show the amount expended by the Lincoln Mines Operating Company under the terms of the lease, which,—

THE COURT: I understand this evidence is directed solely to the question which will be presented to the Court, whether the lessor owning the property was doing business in this state by reason of the operations of the lessee, the money spent. I understand you confine it to that phase and are not attempting to trace the property.

MR. LANGROISE: We do not direct it to the proposition of tracing the property at all.

THE COURT: Over-ruled.

MR. HAWLEY: Exception, please."

Thereupon the witness was excused in order to get the general ledger of the plaintiff company.

WILLIAM I. PHILLIPS, called as a witness for the plaintiff, and first being sworn, testified as follows:

I am William I. Phillips, the President of the plaintiff corporation, and as such executed defendant's exhibit No. 6 at the request of the Manufacturers Trust Company. I am familiar with plaintiff's exhibit No. 12 and it is an inventory of the personal property of the Lincoln Mines Operating Company. I am familiar with the property owned by the Lincoln Mines Operating Company.

THE COURT: Mr. Phillips, you have in your hand exhibit No. 12?

A. Yes, sir.

THE COURT: Is that the inventory of personal property of the Lincoln Mines Operating Company?

A. Yes, sir.

THE COURT: Do you know from your own knowledge that that property was purchased by the Lincoln Mines Operating Company and paid for by that company?

A. Yes, sir.

THE COURT: You know that of your own knowledge?

A. Yes, sir.

MR. HAWLEY: I object to this. It is not the best evidence.

THE COURT: Over-ruled.

MR. HAWLEY: Exception.

THE COURT: Did you say that you were present when this property was purchased?

A. I was not present, but I know it was bought and paid for by the Lincoln Mines Operating Company.

THE COURT: And delivered to it?

A. Yes; and used by it.

THE COURT: Were you out there at that time?

A. Yes; I lived out there for a time.

THE COURT: What were you doing out there?

A. I was out there when the mine was being operated, and lived out there from June, 1932, up until the following February, 1933, when I turned the property over to Mr. Hawley,—no, I didn't turn it over to him then, but I did the following April. I lived in the apartment, we building a building with offices on the ground floor, and an apartment.

THE COURT: What were you doing?

A. Operating the mine, working the mine.

MR. HAWLEY: And what company was he operating the mine for? I think it was the Ojus Mining Company.

THE COURT: He said the Lincoln Mines Operating Company bought it and paid for it and it was delivered to that company.

A. Yes, sir.

THE COURT: Now go ahead.

MR. HAWLEY: I move to strike the testimony of the witness as to the ownership and delivery of the property on the ground, first, that it is not the best evidence; second, that his testimony as to residence on the property does not show that he was operating for the Lincoln Mines Operating Company. The fact is he was operating for another company, the Ojus Mining Company.

It is not the best evidence, and the property is not identified. This is not the way to prove ownership of property.

THE COURT: This testimony relates to the personal property. The objection is over-ruled.

MR. HAWLEY: Exception.

MR. LANGROISE: We offer in evidence exhibit No. 12.

MR. HAWLEY: Objected to as not properly identified and not the best evidence. It does not show the ownership of this property.

MR. LANGROISE: This witness has testified that he knows that this is the property of the Lincoln Mines Operating Company. I am offering this without having him detail every item.

THE COURT: Over-ruled.

MR. HAWLEY: Exception.

MR. LANGROISE: We would now like to withdraw this witness and continue with the regular order of proof in connection with the property and other things as to doing business."

PLAINTIFF'S EXHIBIT NO. 12

LINCOLN MINE, Pearl, Idaho.

Inventory taken April 27th—May 8th, 1933.

By W. A. Harvey

Lincoln Mines
Pearl, Idaho.

AIR RECEIVERS AND BOILERS: 1

1 Air receiver 2' in diam by 6'. (Baxter Foundry attachment)

1 Air receiver 2' 6" in diam by 8' with gauge.

1 Air receiver 2' by 5' with air gauge.

AUTOMATIC STARTING EQUIPMENT: 2

1 Union Manufacturing Co. Milwaukee, Wis. Magnetic switch 125 H. P. 440 volts, 60 cycles 3 phase serial #198228.

1 Union Manu. Co. Milwaukee, Wis. Starter for controller 125 H. P. 440 volts 60 cycles 3 phase serial #198227.

1 Three section rheostat, Union Electric Co. Milwaukee Wisc. 125 H. P. 440 volts. 3 phase, 60 cycles, type Z. Y. Serial # of section 198227.

1 Westinghouse Electric & Man. Co. A. C. rheostat. controller style 447914.

1 Cutter Hammer Man. Co. switch #10036H16.

1 Two section cutter hammer rheostat.

1 Three section West. Elect. & Man. Co. Rheostat.

1 Externally operated electric switch type A #72354. Trumbull Electric Man. Co.

1 Enclosed Electric switch type C. #40354.

1 Potential starter type R. 50. 100 H. P. 60 cycles 3 phase. Allis Chalmers Man. Co.

1 Push button starter switch.

1 Gen. Elect. Co. Schenectady, N. Y. rheostat type S.R.C. D.L. 69154.

1 Westinghouse safety switch, type W.K. 97.

1 Trumbull Electric Co. enclosed switch C. #40321.

1 Trumbull externally operated switch type A. #72351 C.

1 Trumbull Electric Co. enclosed electric switch type C, #40353.

1 Westinghouse Electric auto. starter style #90851.

1 A.G. Electric Co. switch # S 250.

1 Westinghouse Man. Co. auto. starter style #3015 A.

1 Westinghouse Electric 40-50 H.P. auto. starter not installed.

AUTOMATIC STARTING EQUIPMENT

Cont'd.: 3

1 A.G. Electric Co. switch #243501 15 H. P.

1 General Elect. starting compensator #456075 125 H. P. for induction motor—with fuse block.

1 Cutter Hammer Mfg. Co. auto. Transformer, starter #9141H473. 75 H.P. Fuse block.

1 A. G. Electric Co. switch cat. #S250 2 pole, 125 volts, 30 amps on light circuit.

3 Jacknife switches.

3 Jacknife switches. Westinghouse Electric Co. auto starter, style #30150A.

1 Gen. Electric Co. starting compensator f H. P. Cat. #2019014 G.H. C.R. 1034KTY.

1 Westinghouse Electric & Man. Co. auto starter style #30151A.

1 Trumbull Electric Co. safety electric switch externally operated, cat. #72351C.

1 Cutter Hammer Man. Co. A. C. current auto. starting switch with thermal cutout.

3 General Electric Co. primary cutouts. type C. cat. #6 by 240, 7500 volts.

ASSAY OFFICE SUPPLIES: 4

3 Pouring moulds, 6 sections each.
1 Cupel tray 16 holds.
1 " " 25 " .
1 Cupel mould, 1¼ in. diam.
1 " " 1½ " " .
1 Hammer.
1 Volumetric flask with glass stopper, 500 cc.
1 " " " " " , 1000 cc.
1 Flask vial mouth, flat bottom, 6000 cc.
1 DFC. burrettee support, #5815 for one burrette.
7 Watch glasses, ground edges, 3" diam.
25 Porcelain crucibles.
3 Annealing cups.

3 Porcelain crucible covers.
6 " casseroles, 4" diam.
1 Wedgwood mortor, 6½" diam.
1 Water bath, 5" diam.
12 8" granite sample pans.
7 Assorted granite sample pans.
6 5" tin sample pans.
9 8" " " " .
8 Tin sample pans, assorted sizes.
4 Seives, 20, 40, 60, 200 mesh.
1 Pair crucible tongs.
1 Pair bullion crucible tongs.
½ Ket scorifiess, 2½" diam.
1 Fairbanks table scales, with scoop.
2 Iron wire triangles, covered.

ASSAY OFFICE SUPPLIES Cont'd.: 5

2 600 cc pyrex beakers.
5 400 cc " " .
8 250 cc " " .
2 150 cc " " .
2 200 cc " flasks, narrow mouth.
2 200 cc " " vial " .
1 250 cc " " vial " .
4 300 cc Flasskes flat bottom, vial mouth.
1 1000 cc " " " " " .
1 300 cc " " " fing neck.
1 1000 cc Graduated cylinder with lip.
3 10 cc " " " " .
4 Test tubes 6" by 5-8".

2 #35 fire clay crucibles.
3 #14 graphite " .
3 #10 " " .
1 Amalgam retort complete.
1 160-300 oz. bullion mould.
1 20 oz. " " .
1 Large concial bullion mould.
2 Fire clay muffle doors.
2 Cast iron cooling stands.
119 20 gram. Utah fire clay crucibles.
3 25 " " " " " .
7 Watch glasses, 4" diam. ground edges.
60 lbs. Soda ash.
60 lbs. bone ash.
50 lbs. Litharge.

ASSAY OFFICE SUPPLIES Cont'd.: 6

10 lbs. Borex glass.
8 lbs. Fire clay.
Lewis 1 Ainsworth button balance.
? 1 Thompson Analytical balance.
1 set seives 12" diam. 60, 80, 150, 200 mesh.
1 Double needle valve gas burner 10" cyl. (Brown)
1 " " " " " 11" " "

BELTS LACING RIVETS ETC.: 7

1 Box hold tite metallic belt lacing, with bolts for heavy duty belt.
4 Cross Crescent belt rivets, large shanks #9.
3 " " " " " " #11.
O ~~1 Belting 43½' long (Repossessed by Baxter Fdry.)~~

1 Rubber belting 10' 8" long.
1 " " 22' 6" " .
1 " " 23' 6" " .
6 #189 Crescent belt plates.
1 Doz. #147 Crescent belt plates.
11 #87 " " " .
2 #108 " " " .

BLOWERERS AND FANS: 8

1 Direct blower, American Blower Co.

BUNKHOUSE: 9

1 Heating stove.
3 Double cots.
21 single cots.
3 Khaki Mattresses.
20 Plain mattresses.

COMPRESSORS: 10

1 Chicago Pneumatic tool Co. two stage air compressor #1721 size 19 by 12' by 12' C.B.
1 Doak Gas Engine Co. compressor #J.O. 131948.

FIRE EXTINGUISHERS: 11

1 Pyrene Fire extinguisher, #952773.
1 Phomene type fire extinguisher, Manufactured by Phrene Mfg. Co. Newark, New Jersey.
1 Pyrene fire extinguisher, #953777.

HAMMERS: 12

1 6 lb. sledge, with short handle.
1 8 lb. double jack.
1 7 lb. double jack.

2 4 lb. single jacks.
1 Hammer (assay office).
2 Mullers (assay office).

HOISTS: 13
Machines 14

JACK HAMMERS:
1 Buda Fay Mfg. Co. heavy duty jackhammer.
~~1 Denver Rock Drill Co. jackhammer #18090 (rented from Missouri Mines.)~~
Machines 15

LEYNERS & DRIFTERS:
~~1 Gardner Denver Leyner, Drifter model 107 (Rented from Missouri Mines.)~~
Machines 16

STOPERS:
~~1 Gardner Denver model 77N stoper.~~ (Rented from Missouri Mines.)
~~1 Denver Rock Drill stoper~~ (Rented from Missouri Mines.)

MILL MACHINERY: 17
1 Marcy ball mill.
2 Mackintosh pneumatic flotation machine.
1 Continuous Portland sluice filter, order #271.4/17.
1 Model C. Dorr classifier, 4 ft. 6" by 17 ft. 2 compartments.
1 Clean up pen 3 ft. in diam.
3 Sheave wheels 4 ft. diam.
1 " " 6 ft. " .

1 Grizzley.

1 Reagent feeder.

~~1 10 ft. conveyor chain for conc. conveyor or from Wilfley conc. tables. (Baxter Fdy. Attachment)~~

MINE CARS & TRUCKS: 18

3 Ore Cars.

2 Ore Cars. 15.5 cu. ft. capacity.

1 Timber truck.

1 Warehouse truck.

MINE OFFICE SUPPLIES: 19

~~1 W. & L. E. Curley surveyors transit. (Nohairs)~~

1 100 ft. steel tape on reel. Chicago Steel tape Co.

1 Protectograph check writer, serial #736619.

1 Underwood Standard typewriter, #5.

2 Filing cabinets.

1 Flat top desk.

1 Swivel office chair.

1 Arm office chair.

1 Heating stove.

1 Letter basket.

2 Home made tables.

MISCELLANEOUS ELECTRIC EQUIPMENT: 20

1 Signal gong on side of Cordova shaft. Hoist room.

1 Signal gong over head in Cordova shaft. Hoist room.

2 Signal gongs, complete with one extra bell, in alley way.

1 Edwards electric gong #510.
2 Coils #8 rubber covered wire 1000 ft. in all.
1 Klein Lineman climbers.
1 Klein belt and safety strap.
1 Electric current meter #4258172.
1 Wall telephone, claimed by Cordova.
1 Electric range, dismantled and in poor condition.
1 Set coils for Allis Chalmers 75 H.P. motor.

MISCELLANEOUS: 21

1 Denver Fire Clay seamless gas tank, 8 gal. capacity. For assay office.
2 Galvanized iron gas drums cap. 50 gals.
1 Clock.
1 Bin holding assortment of bolts & nuts.
1 Flue cleaner adjustable to 4".
1 " " " " 2".
1 Pressure relief valve, 2½".
3 Gardner air line oilers.
1 Carton valves for Deming trilex pump.
11 Side rods for air drills.
1 Rachet operated Toledo pipe Machine, with dies for threading pipe from 2½" to 4".
3 Gauge glasses 3/8 by 12".
2 Compressor rings for Doak Compressor.

MACHINERY, MISCELLANEOUS, ETC.: 22

O ~~1 American Scale Co., platform, 600# capacity #9897.~~
1 Blacksmith solid box vice, 6" jaw.
Lewis ~~1 Grindstone, angle iron frame and double treadle.~~

LUMBER SHED MISCELLANEOUS: 23

1 Counter shaft.
1 Drive shaft.
1 Wheelborrow.
1 Canthook.
1 Fair come-alongs.
1 Picaroon.

BLACKSMITH SHOP, MISCELLANEOUS: 24

10 Pairs blacksmith tongs.
5 cutting tools handled.
2 Bottom swedges, 1½".
1 Top swedge, 1".
1 Flatter.

MISCELLANEOUS COOK HOUSE SUPPLIES: 25

1 Frying pan.
4 Bread pans.
1 Drip pan
2 Tea pots.
2 Coffee pots.
13 Dinner pails.
12 Individual bread pans.
5 Salt shakers.
2 Milk shakers.
4 Sugar bowls.
12 Cups.
2 Platters.
4 Serving dishes.
15 Mush bowls.

1 Tennessee range, water jacket connected to range.
1 Kelvinator, freezing unit #3300.
1 Cutter Hammer Mfg. Co. Current starting switch. (Already included in inventory.)
3 Dining tables.
1 Kitchen work table.
1 Kitchen serving table.
1 " work table with flour bin.
1 Dish up table with shelves.

CAMP MISCELLANEOUS: 26

1 Wheel puller.
1 Locker box containing meters.

MINE SUPPLIES, MISCELLANEOUS: 27

1 Boring machine and timber auger.
1 Shell complete with screw feed.
1 6' column.
1 6' column with clamp.
~~1 4' cross bar, without cap for jackscrew.~~
~~1 Arm and clamp for cross bar.~~
~~1 4' cross bar complete.~~
1 2' jackscrew.
1 16" " .
O ~~1 Jim Crow rail bender, 2' spread of hooks. (Baxter Foundry Attachment).~~
50# fish plates.
~~1 50' machine air hose, 3/4" (rented Missouri Mines).~~
~~1 40' machine air hose, 3/4" (rented Missouri Mines).~~
2 Lengths of water hose, 34' each.

1 33' of 3/4" air hose.

1 23' of ½" water hose.

1 12' of ½" water hose.

1 Gardner airline oiler.

1 Buda Foundry & Mfg. Co. railroad jack.

MOTORS: 28

1 Allis Chalmers Mfg. Co. continuous duty induction motor, 75 H.P. Fall load, 550 R.P.M. 440 volts, 60 cycles, 3 phase, serial #113229.

1 Allis Chalmers Mfg. Co. Induction motor, 100 H.P. 3 phase, 60 cycles, 115 amps. 440 volts, 1750 R.P.M. serial #223BS823, 4104.

1 U. S. Elect. Mfg. Co. induction motor, serial #17843 75 H.P. 440 volts, 1200 R.P.M. located at Los Angeles, Cal. (1-Pulley Baxter Foundry attachment)

~~1 General Electric Co. Induction motor #112048, 60 cycles 440 volts, 52 H.P.~~

1 Gen. Elect. Co. Induction motor #4586254.

1 Gen. Electric Co. Induction motor 5 H.P. #1343138.

1 Gen. Elect. Co. motor type K. T. 752, 15 H.P. #760.

1 West. Elect. induction motor type C.C.L. 15 H.P. torn to pieces.

1 West. Elect. induction motor type C.C.L. 15 H.P. serial #455104.

1 Gen. Elect. Co. induction motor, model A-67-294 7 H. O. serial #4860485.

1 West. Elect. & Man. Co. induction motor 30 H. P. type CCL, #579472.

1 Gen. Elect. Co. induction motor, 3 H.P. #244734.

1 Allis Chalmers motor, 125 H.P. #115956.

1 Fairbanks Morse single phase 1 H.P. motor #205628.

1 Gen. Elect. Co. 1½ H.P. motor serial #317612.

1 West. Elect. & Man. Co. centrifugal motor #2 5 H. P.

MOTORS Cont'd: 29

PACKING: 30

1 Pieces Rainbow rubber belt packing, 3" by 3".

35 lbs. miscellaneous packing from 1" to ⅝".

12 lbs. square Columbia packing, 1" by 1".

10 3/4 lbs. " Belmont flax packing, 1¼" by 1¼".

10½ lbs. " " " " 1¼" by 1¼".

1½ lbs. " Dragon " " ½" by ½".

2 lbs. Skookum Graphite " " 5/8" single rings.

3 lbs. " " " " 5/8" in coils.

PIPE FITTINGS: 31

26 Pipe fittings in form of ells, bushings in sizes 4" to 3".

350 Pieces pipe fittings in form of ells, nipples, tees, couplings, unions, bushings, & valves. (4" to ½")

243 Miscellaneous pipe fittings from ¼" to 2".

44 " " " " 3" to 4".

PIPE: 32

7600 Feet of 3" pipe. (In ground from Marquite

shafe at Pearl to Lincoln Mine.)

100 Feet of ½" pipe.

PULLEYS: (PRESSED PAPER) 33

1 P. P. Pulley, 7½" drum by 6½" face, bushed to 1½". (Bad)

1 P. P. Pulley, 4" drum by 4½" face. Keyway for 1" shaft.

1 P. P. Pulley, 10" drum by 12" face.

PULLEYS (WOOD SPLIT)

1 W. S. Pulley, 6" drum by 6" face.

1 W. S. " 18" " " 6" " with bushing to 1 and 11/16.

1 W. S. Pulley, 4' 6" diam. by 8" face.

1 " " 4" " " 8" " .

1 " " 3' 6" " " 8" " .

1 W. S. " 28" " " 8" " .

1 " " 26" " " 8" " .

1 " " 26" " " 6" " .

1 " " 16" " " 10" " .

2 " " 14" " " 6" " . (1 badorder.)

1 " " 14" " " 6" " .

1 " " 5" " " 6" " .

PULLEYS (STEEL SPLIT)

1 S. S. Pulley, 10" diam by 10" face (incomplete & rusted).

1 S. S. Pulley, 10" diam by 7" face with bushing to 2".

1 S. S. Pulley, 10" diam by 7" face with bushing to 2 3/8.

1 S. S. Pulley, 6" diam by 4" face.

1 S. S. Pulley, 14" diam by 6" face. (Baxter Fdy. attach.)

PULLEYS (PRESSED STEEL)

1 P. S. Pulley 36" diam. by 5" face.
1 " " 32" " " 7" " .
1 " " 26" " " 9" " .
1 " " 16" " " 7" " .

PULLEYS MISCELLANEOUS 34

1 Solid cast iron pulley, complete with set screws for 2" shaft.

1 C. I. Pulley, 4 ft. diam. by 5" face.

1 Friction clutch pulley, 3' diam. by 12" face.

1 Solid cast steel pulley 20" diam, by 5" face.

PUMPS: 35

1 Tamp pump.

4 Sand pumps. Union Iron Works, Spokane, Wash.

2 Centrifugal pumps, 1½" #40805 by Swaby Mfg. Co.

1 Centrifugal pump, #2.

Lewis 1 Cameron Steam pump #1204, 3" suction 2½" discharge. sinking

1 Dorr Co. one body pump, suction.

SAWS: 36

1 Ripsaw, 24" in diam.

1 Swing out off saw, 3 ft. in diam.

STEEL SHARPENING EQUIPMENT: 37

1 Anvil, weight about 200 lbs.

1 Sow, for hand sharpening of drill steel.

1 Gardner Denver Drill sharpener, model 3, complete with dies and dolloes. (Rented from Missouri Mines.)

STEEL, AND DRILLS: 38

8 Twist drills, 2 round shank.

8 Hand augers for drilling soft ground.

1 2' hand auger, coal miners pattern for soft ground.

2 4' hand auger, coal miners pattern for soft ground.

TRANSFORMERS: 39

1 West. Elect. Co. type S. Transformer, 15KVA, serial #264507.

2 West. Elect. & Man. Co. current transformers, type A. maximum line potential 2500 volts, style #125611A.

VENTILATOR PIPE: 40

160 ft. glavanized pipe, 10".

It was then stipulated that the Manufacturers Trust Company has or had an agreement or arrangement with the Huron Holding Corporation by which the facilities of the Trust Company were used by the Huron Holding Corporation in the liquidation of the accounts assigned to the latter.

At this point plaintiff's Exhibit No. 14 was admitted in evidence and is as follows:

January 13, 1932.

Mr. William I. Phillips,
28 North Biscayne Boulevard,
Miami, Florida.

Dear Mr. Phillips:

Your letter of January 8th, 1932, was referred to me by Mr. Posner of Jones & Neuberger. I was indeed sorry to learn that the hoist was not returned sooner than December 28th, 1931, or there-about, and that this affair delayed your starting operatings at the mine. In view of the circumstances outlined I hereby grant you an extension of sixty days from January 21st, 1932, such date being the limit of time allowed under our agreement dated November 21st, 1931, for commencing work at the Lincoln Mine. I would like to take this opportunity to notify you that all further communications and matters pertaining to the Lincoln Mine lease should be addressed to the Manufacturers Trust Company, 55 Broad Street, New York City, attention Mr. J. Lawrence Gilson, vice-president. Any arrangements or notifications to be made by Mr. Gilson shall be deemed as having been made by me.

Yours very truly,
Alexander Lewis.

ELMER W. FOX was recalled as a witness on behalf of the plaintiff, and having been previously sworn, testified as follows:

I have with me in court all of the books of the plaintiff corporation from which my audit was made in December, 1929. The books correctly reflect the invoices. I cannot find all of the invoices or all of the books, but they were all examined prior to my report in 1929. The books show in machinery and equipment account $70,095.87. The development account shows $11,677.86.

MR. HAWLEY: Your Honor will remember that I agreed, to save a lot of time, that the Lincoln Mines Operating Company did do a lot of work, did build roads, and did put in machinery. Now, why detail this after that general agreement, I cannot understand.

THE COURT: If your agreement covers this of course it would be a duplication again.

MR. CASTERLIN: He refused to agree as to the amount expended, and how it was spent, for what purpose.

MR. HAWLEY: I stated at that time that I could not state, and didn't know the exact amount. I had seen one list, and it was a considerable list. They wanted to agree it was some three hundred thousand dollars that had been spent by the Lincoln Mines Operating Company, and Mr. Fox testified now that that amount was something over three hundred thousand, and why go into these items and take a lot of time on that,

unless your Honor feels that it is necessary in deciding this question.

THE COURT: Counsel under his theory wants to show the specific amount referred to in the least, but in a general way, if you have agreed to that, why go over it again, but now it seems you can't agree that you have agreed, and now you are coming down to the question of whether the agreement covers certain items. We might save time if we go ahead.

MR. HAWLEY: I think that Mr. Fox having given the information as to his last audit, I have that information which I didn't have before, and I would not have any objection to saying that the books show an expenditure of some three hundred thousand dollars on roads, equipment, etc.

MR. LANGROISE: Then you are willing to agree that the Lincoln Mines Operating Company expended during the time of their lease with Alexander Lewis acting for the Manufacturers Trust Company on the Lincoln Mines group of claims in the Westview Mining District, Gem County, in the erection of buildings, the repair of buildings, the construction of telephone lines and the repair of power lines, building of roads, and development of mining property itself, in the purchase of mill machinery and equipment, the sum of $309,000?

MR. HAWLEY: That is what your books will show, and I will agree to that.

CROSS EXAMINATION

This was a closing and final audit of the Lincoln Mines Operating Company. The books show no operation after December 10, 1929.

GEORGE SHAFFER, called as a witness for the plaintiff, was duly sworn and testified as follows:

My name is George Shaffer. I have lived at Emmett, Idaho, for about 25 years. I worked at the Lincoln Mine near Pearl, Idaho, for the Ojus Mining Company for about two and one-half months during 1932. Mr. William I. Phillips was in charge at that time and I worked for Mr. Berthelson who was operating the Lincoln Mines*a*bout two months after the first of May, 1933. I operated part of the equipment on the Lincoln group of mines at the time the Ojus Mining Company was operating. Mr. Berthelson used the lines, transformers and part of the motors that had been used by the Ojus Mining Company; also air compressors and crusher in the mill—ore cars and other equipment—I do not know what was used underground as I was on top. Berthelson put in a pump and motor in the old Lincoln shaft which was in addition to that used while I worked for the Ojus Company. He also put in a couple of high lines to the old Lincoln shaft. The machinery was running when I was working for the Ojus Mining Company. The

electrical equipment was in fair condition and the mill was in operation, also the motors, the compressor, the hoist, the pumps. When I returned to work for Mr. Berthelson the electrical equipment was in fair running condition.

CROSS EXAMINATION

I was an electrician, as helper, just as an electrician there. I was looking after the motors, inspecting them and did some changing there. When I worked for Berthelson I oiled the motor that pulled the hoist. That motor ran fair and did its work. There was also a motor that ran the compressor. My work was looking after the motor, starter and things. I had to put in a contact on the starter—like putting in a spark plug—and keep starters in shape. I worked on the motor on the ore crusher to oil it and fix contacts. That motor ran out a little stuff and then it was shut down. I also worked with the small motor on the fan to throw air down in the mine. I worked on the motors at both the Lincoln and Ojus shafts. The motor at the Ojus shaft was large. I looked after five motors—put fuses in the transformers of which there were six. While I was there the property I worked on worked, and I examined it and kept it running. It wasn't necessary to go into the machinery when it was working. I didn't have to go into the motors or transformers. At spare time I worked as hoise man. I also changed the transformers from high

to low voltage. The mill was not worked, only the rock crusher.

REDIRECT EXAMINATION

The mill was running when I worked for the Ojus, but not when I worked for Berthelson.

"THE COURT: Now, as to the offer of Exhibit No. 3, the objection to it will be over-ruled.

MR. HAWLEY: Exception.

THE COURT: I understand these are offered as to the question whether they were doing business, as well as the transfer.

RECROSS EXAMINATION

When Berthelson was operating I worked on both the Ojus and the Lincoln shaft hoists. The Ojus hoist was used every day, and the Lincoln hoist, I don't know how often it was used. I also used shovels, picks, and stuff underground.

FRED TURNER, called as plaintiff's witness, being sworn, testified as follows:

I am Fred Turner. I live at the Lincoln Mine where I have been since October, 1933. I was hired by Mr. Erickson and have been at the mine ever since. Bill Young and Erickson have been there with me. We have sunk a shaft about 125 feet deep, run one drift about 150 feet, two about 75 feet and one about 50 feet. We ran a tunnel in the neighborhood of 400

feet. We received our pay from Huron Holding Corporation in every instance. Checks were always signed by Mr. Bacell. In connection with my work I corresponded with Mr. Fozard, reporting to him about every two weeks the amount of work done. I did the work partly on my own and partly on instructions from Mr. Fozard.

It was thereupon stipulated that Mr. Fozard has been Vice-President of the Manufacturers Trust Company since May, 1925, and director of the Huron Holding Corporation since 1934. Prior to that time I was an employee of the Manufacturers Trust Company.

WILLIAM I. PHILLIPS, recalled as a witness for the plaintiff, having been previously sworn, testified as follows:

The Lincoln mill was operated prior to April 25, 1933, and was in excellent condition. I was in and about the mill a good deal when it was running in 1932 and had occasion to observe it and notice its operation. The mill was in excellent condition. Our recovery was as high as 94.7 per cent. I kept in touch with the superintendent to know what the mill was doing. The mill was closed in April, 1933.

> "MR. CASTERLIN: I think we can agree that on April 25th, 1933, all of the personal property of the Lincoln Mines Operating Company then on the Lincoln group of mining claims

which have been mentioned in this action came lawfully into the possession of the owners of the Lincoln group, and that possession of the owners remained lawful respecting said personal property until June 4th, 1936; that the personal property of the Lincoln Mines Operating Company was so left on the claims by the owners thereof, or the Lincoln Mines Operating Company which had not abandoned the same; that the property described in the Harvey inventory, so-called, is the property which was left on the mining claims; and that the property described in the Harvey inventory was owned by the Lincoln Mines Operating Company, the Ojus Mining Company, or the owners of the mining claims; that W. I. Phillips was at all times and now is president of the Lincoln Mines Operating Company.

MR. HAWLEY: That is agreeable.

I was on the Lincoln Mine during the last operation for the Ojus Mining Company. The property was generally in good working condition and was in the same condition as it was when it was turned over on April 25, 1933. The machinery used in the operation of the mill was in place when it was turned over on April 25, 1933. The mill equipment and the machinery and the mill was ready to run on April 25, 1933. No outside equipment was used during the month of April, 1933.

CROSS EXAMINATION

"BY MR. HAWLEY:

Q. I believe that the property, whatever it was, that was owned by the Lincoln Mines Operating Company on April 25th, 1933, was covered by a chattel mortgage that had been given to you in the sum of $45,000 by the Lincoln Mines Operating Company, and by you assigned to Mrs. Pierson?

MR. LANGROISE: That is objected to as incompetent, irrelevant and immaterial, whether or not the property was subject to a chattel mortgage is not an issue in this case, and has nothing to do with the determination of the possession.

THE COURT: When is it claimed that this mortgage was given?

MR. HAWLEY: The first of September, 1927, made by the Lincoln Mines Company to Mr. Phillips himself, and by him assigned on the sixth of August, 1929, to Helen S. Pierson.

THE COURT: It is a question of whether it is admissible and has any bearing on the value of the property in 1933, at the time you claim possession was taken. It may be that by reason of this mortgage being of record one could not move this property without consent, but the issue here seems to be the possession. It may be admissible in rebuttal of a value, if any was placed on this

property. I doubt if it is admissible at this time. I cannot see where it is, but I can see where it might be admissible in rebuttal, or if this witness testified as to the value of this property it might have a bearing then. After you offer in evidence, if you do offer in evidence, as to its value, whether they would have a right to show the chattel mortgage, that would be a question, but I think at this time it would not be admissible. You will understand that I am not holding that it is not admissible at any time.

MR. HAWLEY: I think I understand your Honor's ruling and I think it is absolutely correct on this question until he testifies as to the value of the property.

In April, 1933, part of the roof was off the hoist house, leaving the motor and hoist exposed partially to the weather.

J. E. PARSONS, called as a witness for the plaintiff, was sworn and testified as follows:

My name is J. E. Parsons. I live in Boise, Idaho. I am employed by the Sawtooth Company in that city which is engaged in mining machinery sales, tractors and equipment, and general machinery service. I have been with that company for about three years. I have had experience with mill machinery and mill equipment since 1918. I was foreman of a concentration mill in Colorado in 1919 with full supervision; in 1920 I was

superintendent of construction of an eight hundred ton concentrate plant at Telluride, Colorado, where I stayed for two and one-half years; built a two hundred thousand dollar wash plant for the segregation of old stope ores in Colorado; supervised building of a high school in southern Colorado after leaving Telluride in 1923; supervised building of Adams State Normal at Alamosa, Colorado, for nine months; revamped the Royal Tiger Mines plant at Breckenridge, Colorado. I have had charge of machinery department for mines and have handled equipment for the Sawtooth Company since my employment there. I recommend equipment for purchasers, advising them what mills to put in; also buy used equipment and rent it to the customers. I feel I was familiar with value of the use of mining equipment on June 4, 1936. I have partly examined Exhibit No. 12 and am familiar with the machinery described in that exhibit. I saw the larger equipment:

Examination by Mr. Hawley:

I was away from the supervision of mills for two years, due to my wife's health. During 1925 and 1924 I supervised the building of school houses. I then went to the Royal Tiger Company, revamped the mills and continued to supervise construction of a concentrator mill and flotation mills for copper in Arizona. I then went to Colorado and superintended the construction of a concentrating mill for lead, silver and gold. I have not built any mills in Idaho. In 1929, I had supervision of the Utah Ore Smelting

Company in Salt Lake City, which is considered ore milling. I then had charge of installing the Transcontinental Compressor Station on the Amarillo to Chicago Gas line in Oklahoma. That was not a mining job. It lasted for four months. Then I went to Kansas to superintend the construction of a compressor plant on the same gas line. I came back to Salt Lake City and went back to mining work in 1931, mining and mining equipment, supervising the equipment for placer mining operations near Soda Springs, Idaho. I then went to Hailey, Idaho, and constructed a mill for my own service on the Croesus Gold Mining property. I was there two years until 1934. I was then engaged with the Sawtooth Company. A part of the time I did designing work for the construction and in many cases I recommended purchases. Prior to 1933, I was not engaged in buying or selling mining equipment and had no experience in that line until 1933 when I began to work for the Sawtooth Company as construction engineer in charge of mining equipment, and also sales engineer. I have been engaged in that since 1933.

It was early in 1937, I believe that I was called upon to appraise the property at the Lincoln mines.

Omitting those items in Exhibit No. 12 through which lines have been drawn, I appraised the mining and milling equipment excepting steel tape. I did not appraise the bunk house equipment, mine office equipment, lumber shed miscellaneous, all miscellane-

ous cook house supplies or transformers. Prior to making the appraisement I examined the property, but was not able to see it all. I saw the larger equipment. I inspected the Lincoln Mine and the property thereon Friday last week at Mr. Langroise's request. I went there about 3:30 in the afternoon and left at 5 or 7 o'clock, spending about 2½ or 3 hours in investigation.

I am acquainted with and have dealt in air receivers, automatic starting equipment of the types listed in Exhibit No. 12, and I have bought and sold equipment of the same type or similar in type to that listed in Exhibit No. 12. My company buys and sells in competition with other companies in Boise. The Udell Manufacturing Company and the Olson Manufacturing Company and the Baxter Machinery and Foundry Company are engaged in buying and selling the same type of machinery which I buy and sell. I have dealt in new and second hand assay supplies, belts, lacing, rivets, beltings, blowers, fans and compressors, both new and second hand milling machinery. I have bought a March Ball Mill from the Atlanta Mining Company. I have handled and sold some miscellaneous electrical equipment. I am acquainted with all the items and the blacksmith shop equipment, both used and new, and miscellaneous mining supplies and electric motors. I have bought and sold motors similar in type and also packing, pipe pipe fittings, pipe, wood and steel and cast iron pulleys. I bought mine equipment for the North Hornet Mining Company at Council, Idaho

abd the complete equipment at the Hailey Bonanza at Hailey, Idaho, and then I have been purchasing parts. The North Hornet mill is a flotation type Ball Mill, and the Hailey Bonanza was a seventy-five ton plant, gravity concentration. I have bought machinery similar to the Lincoln Mines property at the St. Joseph mine and I come in competition with the Boise Junk Company and other salvaging companies. I also buy motors. There is a market here for electrical motors and equipment and also for this type of mining machinery.

To the best of my knowledge, I would say the total of all the items I valued is $16,949.68. That does not include transformers and other group of items which I have referred to. I am familiar with the rental price of equipment of this kind to the extent of what I have rented in the vicinity of Boise and Pearl during the period from June 4, 1936, to October 14, 1937, and know in checking what other parties have rented. I have engaged in renting equipment and in some cases am familiar with rentals of other concerns.

Q. Is there a rental or market for the rental of equipment of this kind, and was there from June 4th, 1936, to October 15th, 1937?

A. There would have been on parts of it, that is, on parts of the equipment.

THE COURT: Why do you say to October the 15th, 1937?

MR. LANGROISE: That is the undisputed date.

THE COURT: The undisputed date of what?

MR. LANGROISE: After the possession was denied they refused the possession and it was on October the 15th, 1937, that the Lincoln Mines Operating Company were told that they could come and get the property. That is the date mentioned.

THE COURT: All right. That is what my inquiry was.

Q. What was the price, or the common rental for equipment similar to the electric motors that are contained in and described in plaintiff's exhibit No. 12 during that period.

MR. HAWLEY: That is not an issue here, and is not relevant or material or competent.

THE COURT: You mean in the market here?

MR. LANGROISE: I want to amend that.

Q. The rental market price in this vicinity here for that equipment.

THE COURT: You mean in Pearl, Idaho?

MR. LANGROISE: I will withdraw that question.

Q. Where the property is, and the Boise market.

There is no one engaged in the business of renting

equipment at Pearl, Idaho, which is about 24 miles from Boise. And it was so stipulated.

Q. Directing your attention to June 4th, 1936, to October the 15th, 1937, that is, between those dates I will ask you if you are acquainted with the rental market value of the equipment such as electric motors during that period?

A. Yes.

Q. What was it?

A. On the average of that equipment—rent for the standard, you mean?

A. Yes.

A. Ten per cent per month of the depreciated value of the equipment, meaning the value of the equipment when it goes out.

Q. Directing your attention, Mr. Parsons, to the equipment of the type and kind of mill equipment out there, what was the market rental value for equipment of that kind and character in this vicinity here during the period from June 4th, 1936, to October 15th, 1937?

MR. HAWLEY: Objected to as not being competent, relevant or material, and the witness is not competent to answer and it is not in issue.

THE COURT: Are you familiar with the reasonable market rental in that vicinity on the date referred to of the property specified in this list? The question is directed to the equipment as listed there.

A. Yes.

THE COURT: The objection is over-ruled.

Q. What was the rental market value for all the equipment as a whole?

MR. HAWLEY: We make the same objection, if the Court please.

THE COURT: Over-ruled.

MR. HAWLEY: Exception.

Q. What was the rental market value of the mill equipment?

A. I must segregate it.

Q. Well, do so.

A. The air receivers,—

Q. —The mill equipment.

A. The Marcy Ball mill installed, ten per cent of the depreciation value per month, and the MacIntosh pneumatic flotation machine,—the flotation cells, five per cent per month; the continuous filter if properly covered at the time of installation, ten per cent value per month; the classifiers, five per cent of the depreciated value per month; the clean-up pen, ten per cent of the depreciated value per month; the sheave wheels is not milling equipment; it is mining equipment, and that is at ten per cent per month; the grizzly bars, ten per cent per month, and the reagent feeders, five per cent per month.

Q. In renting equipment in this market, that is, in this vicinity, in determining the rental mar-

ket value on this equipment, for what period does that continue?

A. For a period, in nearly all cases, it is rented with an option to purchase, with the rental to be applied on the purchase price.

Q. For what period is the rental charged?

A. The basis of thirty days.

Q. When does this rental start to run?

A. From the time it is moved from our sheds, or yards.

Q. And when does the rental cease?

A. At the time it is returned to us in good condition.

Q. Does it make any difference in the rental whether the equipment is used or not used?

A. No, sir.

I place a value on the Marcy mill of $3,800.00; on the blower of $550.00; on the porcelain filter $1,800.00.

"The model C classifier, $850.00; one clean-up pen, $300.00; the sheave wheels, four foot diameter, $10.00 each for three of them, and one six-foot diameter, forty dollars. That is the valuation on the sheave wheels, but I am not maintaining that it is mill machinery. One set of grizzly bars, $20.00; the reagent feeder, $80.00.

Q. Now, Mr. Parsons, I wonder if you will turn to the electrical equipment, and in view of the fact that the rental is based on the value, give

us the value of the separate pieces of equipment as you have them.

A. The Allis-Chalmers Manufacturing Company continuous duty induction motor, seventy-five horse power, 550 r.p.m., 440 volts, the appraised value is $727.20; one Allis-Chalmers induction motor, one hundred horse power, 440 volts, 1750 r.p.m., I checked that, and it is in very poor condition and must be rewound, and my opinion is that it is not worth over one hundred dollars; the U.S. Electric Manufacturing Company's induction motor, seventy-five horse power, 450 volts, 1200 r.p.m., $476.00; the General Electric induction motor, five horse power, $65.00; —I guess I gave that before; and the General Electric motor type KT, fifteen horse power, $228.80; one Western, — or Westinghouse electric induction motor, type CCL, fifteen horse power, that was torn down, and in checking it it is not worth the repairs, and I placed no value on it; the Westinghouse Electric Company induction motor, CCL type, fifteen horse power I appraised at $145.60; the Westinghouse Electric Company motor, three horse power, $46.40; the General Electric Company fifteen horse power induction motor, $145.60; the General Electric induction motor seven and a half horse power, it is listed as seven horse power, but it is a seven and a half horse power,—

Q. Seven and a half horse power?

A. Yes, instead of seven horse power, and that is valued at $224.00, — no, pardon me, that is $73.60 on the seven and a half horse power motor. The Westinghouse Electric & Manufacturing Company induction motor, thirty horse power, $224.00; the General Electric induction motor, three horse power, $46.40; the Allis-Chalmers motor, a hundred twenty-five horse power, $896.00; the Fairbanks-Morse single phase, one horse power motor, $48.60; the General Electric Company, one and a half horse power motor, $21.50; the Western Electric centrifugal five horse power motor, $65.00.

Q. Now, Mr. Parsons, I wonder if you would return to the other equipment which is listed under automatic starting equipment, and give us the appraisal on the various items there.

A. The Union Manufacturing Company magnetic switch; 125 horse power, that is a magnetic starting switch, 440 volts, $315.00; the Union Manufacturing Company starter for controller, 125 horse power, 440 volts, $160.00; three section theostat, 440 volts, $60.00; the Westinghouse Electric & Manufacturing Company theostat controller, $123.00; the Cutter Hammer Manufacturing Company switch, $9.50; the two section Cutter Hammer rheostat, $20.00; three section Western Electric Company rheostat, $30.00; the externally operated electric switch, or Trumbell safety switch, $9.50; one enclosed electric switch, $9.50;

potential starter for one hundred horse power, three-phase Allis-Chalmers motor, $83.80; one push button starter switch, $3.00; General Electric theostat, $35.00; Westinghouse safety switch, $9.50; Trumbell Electric Company enclosed switch, $9.50; Trumbell externally operated switch, $9.50; Trumbell Electric Company enclosed switch, $9.50; Westinghouse Electric Company auto starter for motor, $15.00; one A. G. Electric Company switch, $9.50; Westinghouse Manufacturing Company auto starter switch, $15.00; Westinghouse Electric Company forty-fifty horse power auto starter, $40.00; one A. G. Electric Company switch, fifteen horse power, $12.50; General Electric Company starting compensator for 125 horse power motor, with fuse block, $315.00; one Cutter-Hammer Manufacturing Company transformer starter, seventy-five horse power, with fuse block, $50.00; one A. G. Electric Company switch, two-pole, $2.50; three jack-knife switches, $3.00, — that is three jack-knife switches at one dollar each, making a total of three dollars; Westinghouse Electric Company auto starter, $15.00; General Electric Company starting compensator, five horse power motor, $72.80; Westinghouse Electric Company auto starter, $15.00; Trumbell Electric Company safe switch, $9.50; one Cutter-Hammer Company current auto starting switch, with thermal cut-out, $20.00; three General Electric Company primary

cut-out type C, 7500 volts, $27.00.

Q. That is all of that type of equipment?

A. Yes, sir.

Q. Now, Mr. Parsons, directing your attention to the jack hammers, are you familiar with the market rental value of jack hammers in this vicinity during the period of from June 4th, 1936 to October 15th, 1937?

A. Yes, sir.

Q. What would you say was the fair rental market value of jack hammers during that period?

A. If they were to use it a week it would be two dollars per day; if they used it for a longer period we cut that price to a dollar fifty a day for continued service.

Q. One thing I intended to ask you about, in giving the appraisal of this property in its entirety, I call your attention to the mining cars.

A. Yes.

Q. In appraising that property, how many mining cars did you appraise?

A. Three mining cars there that I appraised.

Q. How many did you fix a value on included in this list?

A. One mining car.

A. You only fixed the value on one mine car?

A. Yes.

Q. Did you use the best or the poorest?

A. Well, they were all about equal, with one

good body, worth $15.00. The wheels and trucks were not worth anything. The body on the cars is the only way I appraised it.

Q. You only put in $15.00 for the appraisement under this altogether?

A. Yes.

Q. Are you familiar, Mr. Parsons, with the rental market value of the starting equipment in this vicinity during the period of from June 4th, 1936 to October 15th, 1937, of a type similar in kind and character as described in this list?

MR. HAWLEY: We object to that as it is not competent, relevant or material, and no foundation is laid for this.

THE COURT: Over-ruled.

MR. HAWLEY: Exception.

THE COURT: The exception is allowed.

A. Yes, sir.

Q. What would be a fair rental market value for that type of equipment?

A. It is the placed the same as the motors, ten per cent of the depreciated value per month.

Q. I will ask you to turn now to the compressors, are you familiar with the market rental value of blowers in this vicinity during the period from June 4th, 1936 to October 15th, 1937?

A. I have a compressor listed.

Q. I meant the compressor.

A. However, it is not a compressor; it is a vacuum pump, instead of a compressor.

Q. Are you acquainted with the rental,—with reasonable rental or the market rental value of that type of equipment in this vicinity, during the period of from June 4th, 1936 to October 15th, 1937?

A. Yes, sir.

Q. Will you give that to the Court and jury?

A. It is ten per cent per month of the depreciated value, the same as the others."

Q. What value do you place on it?

A. I value that at $350.00."

CROSS EXAMINATION.

I did not make an inventory of the property myself, but took the list handed to me by counsel. I used a General Electric catalog for the original price of most of the items and in comparison to that I placed the price that I felt the property was worth. Practically all the electrical manufacturing companies' list prices are the same for certain services. I get the value of electrical equipment from original bills that I have purchased from other companies. I know where there are for sale some machines like those listed and I have some of them for sale. In order to get the machinery list I looked up the names and I know also where some of those machines are for sale and I also have some of them for sale.

"Q. When you valued the Marcy Ball Mill, where did you get that price? How did you start?

A. I have a quotation on a Ball mill from Medford, Oregon, setting on a concrete base, and as they say, it is there with liners about half worn out. It has no good herring-bone. The Pacific States Mines are holding that for $3500.00, and this has herring bones, which makes it about four hundred dollars more, and not only that, we have a Ball mill at Atlanta which we have quoted for $3000. This is a better mill and easier to sell than the mill we have and are offering for sale.

Q. Did you go to a catalog to find the original cost?

A. No, sir.

Q. Then you base the valuation of the Marcy mill upon what someone at Medford, Oregon, has quoted you?

A. And also what the Sawtooth Company says they will take.

Q. That is your own personal mill that you bought?

A. And I have known other mills.

Q. The classifiers, I notice you have two figures on that?

A. The first is the new price.

Q. Where did you get that?

A. From the catalog and the general price of equipment that we have, and then I made the

proper depreciation after looking at that classifier."

I am very well acquainted with the equipment and know it is a recent make of the equipment that I priced, and I priced it accordingly. I would sell the classifyer for $350.00 right here. I would sell the 125-horse power Union Manufacturing Company's starter at $160.00. If it had to have all new contacts it would not be much of a repair and I allowed enough for that. That is the value to the customer if he wants to purchase it, and I would expect to get that for it. The starter which I have priced at $160.00, that would be the selling price if I purchased the entire equipment at the Lincoln Mines. All of the prices I have fixed and quoted are those which I think I should get as a seller of that property if I had it in the Boise yard."

In fixing the prices I have fixed and quoted prices which I think I could get as a seller of that property if I had it in the Boise yard.

"Q. And that is true of each of the articles, the selling price, or the market value, which you have announced here in Court?

A. I cannot guarantee that, because I was checking the equipment and giving my best opinion of what it is worth. I may be in error, of course, on some of that equipment.

Q. Where would you be in error.

A. Possibly I would lower the price twenty-five dollars on one article when I sold it, or

possibly I would raise the price twenty-five dollars, but that is my best judgment of what it would sell for. I am just making an example there that I would raise or lower the price twenty-five dollars. You might pick out an item and sell it for fifteen dollars more, and I might put a price on there that would not hold to the cent. I am giving my best judgment. I may have to vary on the selling price, but that is my best judgment, and that is the value it should have. It should be that valuable to the customer.

Q. All of which means and amounts to the fact that you are giving us so far as you have specifically set forth the price of specific articles, you are giving us what you consider your best judgment of what the customer would pay for them at your yards in Boise?

A. Yes.

Q. Ready to haul it away to his place?

A. Yes.

Q. And that is what you base this valuation on?

A. Yes, sir."

Respecting the motors, all of the big companies list their stuff at the same price. There is no difference between a ten-year-old and a five-year-old motor. In some cases, Iwould rather have a fifteen years old than ten years old. I saw these motors, and, being familiar with motors, looking at the insulation,

and then when it was in poor condition, I depreciated it for that condition, and when it appears to be in good condition and so that there was a good clearance, I felt I was in the clear on the price. If the motors required it, I would make an allowance for rewinding.

In examining the motors I did not take over five minutes to a motor. I figured the motors in each case separately. The motor valued at $727.20 is 80 per cent of the new price at the factory and by me represents what I consider the fair market value to the customer, what it would be worth to him.

"Q. And you would expect to have it to turn over to him at Boise at that price, that is, that would be the price at Boise, Idaho?

A. No, not likely. I would sell it at the property. If I purchased the equipment of the Lincoln Mines I would likely, in preference to moving it, put a watchman there and sell it out there. I would sell it out there similar to the way that I sold it at Atlanta.

Q. There is a market value at the Lincoln Mines, is there?

A. Yes.

Q. You think there is a market value for this property at the Lincoln Mines?

A. It is as good as the Lincoln Mines as it would be at Boise; a difference of twenty-six or twenty-eight or thirty miles doesn't depreciate the

value, and many customers would rather take it off the base in preference to buying it here at Boise and have it out in the weather.

Q. Uniformly throughout you have taken eighty per cent of the list price on this equipment?

A. No, not constantly. Some places I have lowered the price due to the fact that the equipment wasn't in good condition, but the motors are almost constant in price, the motors in good condition, that is, they were all in good condition, only one that I marked otherwise, and depreciated the value more than twenty per cent, but the others were quite consistent."

I had a 50 horse power motor and 100 horse power motor last June, but I haven't had a 75 horse power motor. We find some motors a month after they have been out are in worse condition than after some have been used for a few years. Naturally I pay very little for those. I would give a much better price for the motors of some manufacturers than for others. There are some motors manufactured in 1912 and 1913 that I would pay a larger price for than some of those manufactured in 1922, which would be the wrong type.

"A. I believe all these motors are worth eighty per cent of the original value, especially to a party that wants to use them, and I would recommend them to a customer in preference to buying a new motor.

Q. You think that this price that you have

given us is the price and the market value generally that would prevail for these motors in Boise?

A. Yes, that is my opinion."

I buy from Udell's and Olson's and Baxter's. When a customer wants to purchase a motor that I do not have, these dealers give me a discount on the price on a similar motor. I put on the blowers and the fans the same price that I have on equipment sitting on the floor, the governing price on that equipment is the price that we are selling similar equipment for. The price for the compressors I got as follows: I sold a compressor of the same size. I am holding it at Atlanta. The compressor here is a little bit smaller and I am pricing it at $100 lower than the vacuum pump at Atlanta. I have known others to sell compressors like these. I am valuing the equipment at the Lincoln Mines not in consideration of my buying it and bringing it in. Possibly I have been misunderstood here. I would charge more in Boise for the heavier equipment, but not for the lighter.

I am making the price at the Lincoln Mines not in Boise and I would sell it at Boise for the same price as I would at the mine.

"Q. (By Mr. Hawley) I want to ask you, Mr. Parsons, in your estimate of the value of the mill and its equipment, as I understood it, your estimate was based upon your general knowledge, and not upon any list price, that is, no listing of that type of machinery?

A. Yes.

Q. That is true?

A. No, there is a new price, and also from my knowledge of what similar equipment has sold for.

Q. It was, of course, based upon the mill in place?

A. Yes, sir.

Q. And in testifying concerning the possible rental value of the mill you did not base that upon the rental price for such property prevalent in the vicinity of the Lincoln Mine, or in Boise, but on the rental price from other states?

A. I would say Boise and in this vicinity.

Q. Did you know of any mill of that size that has been rented?

A. Not in this vicinity.

Q. Then there is no criterion or standard of a mill of that type in Boise and in this vicinity based on actual experience in Boise or in the vicinity of the Lincoln Mines?

A. I have had inquiry around here on the rental of mill equipment.

Q. Now, would you please answer my question.

MR. HAWLEY: I will ask the Reporter to read it.

(Question read by the Reporter.)

A. No.

Q. The rental basis that you take was from your experience in other states?

A. In Idaho, as well as in other states."

"Q. And your figure on the rental for that mill in its condition at the present time is not based upon any actual rental experience in Boise, or in the vicinity of the Lincoln Mines?

A. Not any rental experience, no.

Q. But it is upon your experience in other states, or in other and remote sections of Idaho?

A. Well, here in Boise. I have had numerous inquiries on the pricing and the rental price on mill machinery, so that there possibly will be a demand for that, and I am basing it on the fact that this locality will likely rent, as well as other localities.

Q. That is on a future estimate, a possibility?

A. Yes.

Q. But it is not based on any actual experience?

A. No actual rental."

There is no difference between my valuation of the property as of October 15, 1937, and my valuation of it as of June 4, 1936.

I value the 7600 feet of pipe on the list here that is in the ground from the Marguerite shaft to the

Lincoln Mines at $3448.26, and the value of the part off of the ground at the same rate per foot. The value of the pipeing would be 40 per cent of the new pipe.

REDIRECT EXAMINATION

"Q. Just as Court was about to recess last night The Court asked whether you had made any calculations of the rental value to which you had been testifying?

A. Yes, that is right.

Q. I will ask you if you have of the property testified to and described in Exhibit No. 12, I will ask you if you have calculated the rental value which you have testified to for the period of from June 4th, 1936 to October 15th, 1937? And in making your calculation for the sake of convenience I will ask you to use the period of sixteen months even. Now, have you made such a calculation?

A. Yes.

Q. Will you give the aggregate of that calculation, the total of the rental value of the property as you have calculated it, the totals?

MR. HAWLEY: That is objected to as not being relevant, competent, or material. It is not based upon any facts; it is conjectural, and has no foundation in fact in this case, there being no foundation for the admission of any rental value.

THE COURT: Over-ruled.

MR. HAWLEY: Exception.

THE COURT: On this pipe that you have been discussing, the proportion on that pipe?

MR. LANGROISE: The total is what I was asking for.

MR. HAWLEY: May I add to the objection, particularly calling attention to the testimony of the witness with reference to objecting to the rental value of the mill property?

THE COURT: Yes; you may add to your objection, and the same ruling applies.

MR. HAWLEY: Exception.

Q. And what,—

THE COURT: What was the testimony involved here in regard to this mill. He started in with the value, and then the basis?

MR. HAWLEY: That is what I wanted to add to my objection, the basis of the rental value of the mill.

MR. LANGROISE: He gives the value of the mill and says that the rental value varies, that is a certain per cent per month; on some property it was ten per cent, and on some, five per cent.

THE COURT: And what was the value of

the mill?

MR. LANGROISE: He values each of the pieces, the units.

THE COURT: Your objection will be overruled, Mr. Hawley.

MR. HAWLEY: Exception.

Q. I want the total of all the rental of equipment listed in exhibit No. 12 based upon your testimony.

A. $18,460.96.

Q. In giving that rental value of that equipment did you include any rental value of any pipe, any of that 7600 feet of pipe?

A. No, sir."

RECROSS EXAMINATION

The total value of the property as I gave it was $16,-949.16, and the rental value that I fixed for the period of one year and four months is the sum of $18,460.96, and I think that is a fair rental value and at the standard price. I think it is fair to charge more for renting the property for one year and four months than the entire property is worth. I do not think that the property depreciated any in value from June 4, 1936, to October 15, 1937. I understand the mill did not operate during that time. I think the rental value of the mill is ten per cent of its value per month. In ten months the rental on that basis would set up the entire value of the property.

"Q. I think you also stated yesterday that in connection with the rental, the rental value, as you were defining it, it was usually coupled or rather that it was the usual practice to couple that kind of rental with an option to buy, or a regular installment sale of the property?

A. No, not necessarily.

Q. Wasn't that the usual practice?

A. No, sir.

Q. What did you say as to that?

A. In some cases that is done.

Q. Is there a standard practice about that?

A. No standard practice.

Q. Your rental of ten per cent per month is,—that figure is just the same whether it is a rental just outright, or whether it is coupled with the insallment purchase contract, or agreement to buy? Is that true?

A. There may be some variation.

Q. What would be the variation,—not in your own practice, but the general practice that you have been testifying to which is prevalent, as you say, in this community?

A. About the only way I can explain that is for example, equipment goes out for use, and they use it for three or four months, and wish to return it. They are charged by the month for it, but if the customer keeps it for six or eight

or nine months, then of course it is only good business that he comes in and makes a contract or agreement to purchase it.

Q. It is only good business, you say, but what is the practice?

A. That would be the practice.

Q. It certainly is good business?

A. Yes, and that would be the practice.

Q. The usual thing in a purchase of machinery or equipment of great value, when the equipment is rented out,—the usual thing is that there is an understanding that the rental applies on the purchase price? Is that not true?

A. Not always.

MR. LANGROISE: We object to this as it is assuming the existence of a fact that is not shown in this case.

THE COURT: You are testing this man's qualifications on cross examination. This witness has given an opinion as to the rental value of this property. Is there any evidence here that there has been any mills rented in this vicinity? If not, then we can go to the second question, if there has been nothing done, and if there is not market, yet you have a right to show by his experience what he has arrived at, and how he has arrived at it, whether there is a standard or not. I think the question is proper.

The objection will be over-ruled.

Q. Is there any other rental practice for any part or any type of the equipment and the machinery involved, the property which is involved in this case, which you have given here in your estimate, or opinion, other than the practice of this ten per cent, or the percentage charged?

A. Not any general practice that I know of.

Q. Then, with the exception of the little property which you say is not based on the practice here, but on some other, then the practice in the rental of all of the other property, and the only practice in connection with the rental of all the other type of property is the percentage basis of which you have testified, and strictly on that percentage basis?

A. Not strictly. There may be others.

Q. What other calculation is used?

A. That is the average.

Q. But isn't there any other practice, other than this percentage method used in this vicinity?

A. Not as a standard known to me.

Q. Then you are not aware of any other instance of rentals of any of the types of equipment, —I am not going to specify each type,—other than the percentage method?

A. Is that including the motors?

Q. I assume that you know this whole prop-

erty, Mr. Parsons. That includes each and every type.

MR. LANGROISE: We object to this. It is too general.

THE COURT: He may answer.

A. Yes, other equipment has been rented, but I don't know how they calculated the basis of rental on it.

Q. Then there is property of this type which is included in this controversy which has been rented but you do not know what the basis of that rental is?

A. In some cases equipment is rented, but I was not acquainted with the conditions involved.

Q. Well, Mr. Parsons, is your testimony here based on the question of rental of equipment on your personal experience?

A. Experience and knowledge I have that others have paid this amount.

Q. It is based upon what you and your company do in the matter of rentals?

A. Yes, and knowledge of bidding on the equipment."

I know no other way to figure rental than on the percentage basis and understand that the practice of other men in the business is the same. I know of such practice.

"Q. You said a little while ago there are

items of this equipment which are rented on a different basis than the percentage basis. Do you mean now that all rental of this type of equipment is on the percentage basis? Is that the practice in Boise and in this vicinity?

A. Not all. For instance, if I may make an example: If there is a party wanting to rent a motor, for instance, for only about four days, just to replace a burned out motor until they have the other one repaired, there would be a minimum charge, and it would not be based on ten per cent, but would likely be much higher than ten per cent per month, because we cannot afford to put it out for four days for ten per cent.

Q. And is that the only exception to the rental practice in this community, that is, is this example which you have just suggested the only exception to the percentage practice?

A. I cannot say.

Q. You don't know?

A. No, sir.

Q. Are there any rentals charged other than the percentage basis on this type of property?

A. Not that I know of.

Q. Now, Mr. Parsons, isn't it generally a matter of contract between the parties, the party renting and the party having the property to rent?

A. It is a contract, yes.

Q. And it is generally a matter of agreement between the two of them as to what rental should be paid?

A. Yes.

Q. And there is no general practice about that, the parties make their own agreement?

A. Yes; they make their own agreement.

Q. And that is what is done with most of the property of this type rented around this country? The two make their own agreement?

A. Certainly.

Q. And they make it the way they want to make it, not according to any rules binding upon them?

A. No rules binding.

Q. Did you see each and every one of the great number of articles that you viewed in the three hours inspection?

A. No, some of them I didn't see.

Q. Then you have valued much of the property without actually seeing it?

A. That was as to the catalog values.

A. Yes, sir."

REDIRECT EXAMINATION

I examined the Marcy Ball mill, the filters, the classifiers, motors and starting equipment to the best of my ability without dismantling them and checking the inside.

RECROSS EXAMINATION

"BY MR. HAWLEY:

Q. In order to know the condition of the Marcy Ball mill, the condition of the gears, and the condition of the working parts, particularly the liners inside, the March mill would have to be dismantled?

A. You would have to pull the man holes.

Q. You didn't do that?

A. No, sir.

Q. And you don't know the condition of the working parts?

A. Not of the liners.

Q. The liners are about one-third of the value?

A. That is approximately right.

Q. And you didn't examine the gears?

A. I examined them.

Q. Would you have to get inside to find their condition, to have them turned over, that is, to turn the mill?

A. No, sir; the gears are in good condition and the pinions, I didn't have to go inside to check the gears.

Q. So far as the motors and the rest of the equipment are concerned, you really,—to know what you would pay for that if you were buying it, you would really have to go into it more thoroughly?

A. I would check it closer.

Q. Closer than you did in this case, because you didn't have the time.

A. That is it."

REDIRECT EXAMINATION

In examining the mill, in order to form an opinion as to its value, there is a scoop and scoop lift which I noticed is hardly worn, but I don't know whether there was a new scoop and scoop lift since the original one.

F. J. ARNOLD, called as a witness for the plaintiff and being sworn, testified as follows:

My name is F. J. Arnold. I have lived in Boise off and on for 25 years. I am a mechanical engineer and have been superintendent of Baxter Foundry in Boise, Idaho, for the past six years.

We rent equipment there. I am familiar with the equipment located on the Lincoln Group of claims near Pearl as I was through the mill when it was running several times in 1932 and 1933 when Mr. Phillips was there. We were furnishing quite a little material for the Lincoln Mines and we would go out and measure what was required there, and I noticed the machinery was in good working order. I am superintendent of the Baxter Foundry Machine Shop. We have a foundry as one branch of the concern. I have designed machines and machinery and repaired machinery and I have done this since I have learned my trade, about 45 years ago, and I have been continuously engaged in that work. I am familiar with the

reasonable market value for the rental of used machinery and equipment in Boise and vicinity during the period from June 4, 1936, to October 15, 1937, of the type I saw in the Lincoln Mine and mill on the occasions when I was there in 1932 and 1933. The reasonable market value of that type of equipment was ten per cent of the value of the machinery per month or more, the rental starting when the equipment is taken out of our establishment and ceasing when it was returned there, and it does not make any difference whether the equipment was used or not when it was gone from our establishment.

CROSS EXAMINATION

To my knowledge the only way that any of the types of equipment or machinery covered in this case is rented is on the percentage basis based on its value. I do not know if there is any rental based on a cash basis.

My answer is based on what the Baxter Foundry charges for renting equipment and material and what it has to pay when it rents material. I cannot say right off without looking at the books what kind of material we rented between June 4, 1936, and October 15, 1937. I am superintendent in charge and know what is going on, but I cannot tell off hand any articles that were rented in the space of that year and four months. I cannot name a single article either that we rented or was rented to us. I would have to refresh my

memory. As to the single articles which I rented during that time, I would have to refresh my memory. I remember that between June 4, 1936, and October 15, 1937, I rented machinery from other concerns in addition to what I rented out and for which they made me a charge of 10 or more per cent.

I don't know whether from June 4, 1936, to October 15, 1937, in Boise or vicinity any mill of this size was rented.

Exhibit No. 15 was introduced and read as follows:

"I, Charles M. Close, Secretary of the Huron Holding Corporation, hereby certify that the following is a true extract from the minutes of a meeting of the Huron Holding Corporation duly called and held on the 9th day of February, 1932, at which a quorum of directors was present.

The chairman then stated that the assets to be acquired from the Manufacturers Trust Company and the Chatham-Phoenix National Bank & Trust Company were of such nature as to require the supervision and attention of an agent equipped to handle and liquidate such assets. After discussion, upon motion duly made and seconded, the following preambles and resolutions were unanimously adopted:

"WHEREAS, substantially all of the assets of this corporation are of a nature which will require careful supervision and attention over an

extended period of time to obtain the ultimate realization, therefrom; and

"**WHEREAS**, this corporation is lacking in the necessary personnel, equipment and facilities for the proper supervision of and attention to the liquidation of the assets of this corporation;

"**NOW, THEREFORE, BE IT RESOLVED** That Manufacturers Trust Company, a New York Corporation, 55 Broad Street, New York City, be and it hereby is designated ,constituted and appointed agent of this corporation to supervise and attend to the liquidation of the assets of this corporation and to the conversion of the same into cash, with full power and authority as such agent to demand, to institute legal proceedings for, to collect, and to receive all moneys or other proceeds realizable upon the assets of this corporation, either of principal or interest, and for and on behalf of this corporation; to execute and deliver receipts, releases and discharges therefor, and to effect and compromise for and on behalf of this corporation any and all claims for such sums, and on such terms as said agent shall deem satisfactory and advantageous, and it was further resolved that this corporation reimburse said Manufacturers Trust Company as agent of this corporation for all costs, expenses and disbursements, which it may make or incur as agent of this corporation aforesaid, and that

the officers of this corporation be, and they hereby are, authorized and directed to remit to or upon the order of said Manufacturers Trust Company from time to time such costs, expenses and disbursements upon receipt of proper bills or statements therefor." And it is signed "Charles M. Close, Secretary."

FRED TURNER was recalled as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

During the time that I have been employed from July, 1933, up to the present date at the Lincoln Mines I have made purchases, under direction and supervision of Mr. Fozard, of lumber and run accounts for purchases for the mine and have used electricity and taken care of that account for Mr. Fozard and myself. These accounts have been carried in the name of Alexander Lewis and still are.

CROSS EXAMINATION

I have used electricity for the house, an electric range and for the blacksmith shop. I have used one motor which is a one horse power motor in the blacksmith shop. That is listed on plaintiff's exhibit No. 12. I used one other motor on the blower in the blacksmith shop once a week. That motor is not listed on plaintiff's exhibit No. 12 and is not the Lincoln Mines Operating Company's property. I used electricity only for lighting the residence, for cooking and in the black-

smith shop. The only property listed on plaintiff's exhibit No. 12 that was used by me or by any one during the time that I was on the Lincoln property is one anvil, steels and drills, 50 lbs. of fish plates listed under "Mine Supplies, Miscellaneous"; three pair blacksmith tongs listed under "Blacksmith Shop, Miscellaneous." I have used one wheel barrow listed under the heading "Lumber Shed, Miscellaneous." Under the heading "Hammers" I have used one 8 lb. double jack hammer, one 7 lb. double jack hammer, two 4 lb. single jack hammers, one hammer, assay office. Out of the entire list of property covered by plaintiff's exhibit No. 12, I have specified all the property which was utilized by me or while I was on the Lincoln Group of Mines. When we sank the shaft and ran cuts we used one car, some cable, hose, rails, picks and shovels, made our own drills and did not use any machine drills and did not use any machinery. The buildings located on the Lincoln Mines are a mill, a hoist shed, two hoist sheds, a lumber shed, a store shed, a boarding house, a bunkhouse, assay office and barn, an office or main dwelling house, two smaller dwelling houses and another dwelling house. I have used the house or office building, the barn and one of the smaller houses, the timber shed, blacksmith shop and the store house.

REDIRECT EXAMINATION

The equipment which I used was such as I wanted and needed to use.

"MR. LANGROISE: We ask at this time permission to ammend the complaint of the plaintiff in this action to conform with the proof, by substituting for Exhibit "A," which is attached thereto, this Exhibit "A" which is a copy of Exhibit No. 12.

MR. HAWLEY: I shall object to that. It is not timely made, and it is not a proper amendment to be made at this time. The plaintiff in this case through its president has set forth a great list of property which he claims, setting it forth specifically, and there should be some statement made by him in order to change this. I think the matter should be explained.

"MR. CASTERLIN: But assuming, your Honor, there is some difference in the property here, this is just a part of the whole. This is some of the same property included in the complaint. We have tried this matter, and the testimony has gone in without objection. They have admitted here this was held by Ojus Mining Company, the owners of the Lincoln Mine, or the Lincoln Mines Operating Company or the defendant, and it has only been a process of elimination to prove what was owned by the Lincoln Mines Operating Company.

"THE COURT: But here we are trying to determine whether the defendant or the plaintiff owns this.

"MR. CASTERLIN: If they had been taken by surprise they would have objected to any of the property except as described in the complaint, but without objection they have permitted it to go in, and there is no objection now that we are proving property not in the complaint on the ground that they were surprised. The proof has already gone in.

"THE COURT: I will state to Counsel that I have reached this view: This offer to amend, that is, if this offer to amend brings into the case any new description of property on the objection heretofore made as to the admissibility of Exhibit No. 12, I think it comes too late at this time. They would not have an opportunity to defend against this additional new property. If it does not bring in any new property you have a different situation. I haven't examined this myself, or checked the description of the property in the complaint, which I understand is in exhibit No. 12. I understand exhibit No. 12 contains also some additional articles to the exhibit which is attached to the complaint.

"THE COURT: I didn't know at the time that the exhibit 12 was offered that it included any additional articles. Does the record show that it contained different property than is contained in the original exhibit?

"MR. LANGROISE: The record may show

that it contains some additional property other than that described in the complaint, of the same type, kind, and character, and in many instances it is only corrections.

"THE COURT: But the descriptions are different?

MR. LANGROISE: That is correct in some cases.

"THE COURT: The objection will be sustained.

RECROSS EXAMINATION

There was no need for any other equipment or property listed on exhibit No. 12 other than I did use and I had no use for it at all.

Plaintiff rests.

FRED J. TURNER, called as a witness by the defendant, having been heretofore sworn, testified as follows:

The Westinghouse 15 h. p. motor and starter, the U. S. 75 H. P. motor, the General Electric 3 h. p. motor, the Westinghouse 30 h. p. motor, the Westinghouse 5 h. p. motor were all housed. The Fairbanks-Morse 1 h. p. motor, the General Electric 5 h. p. motor, the General Electric 7½ h. p. motor, the Westinghouse 30 h. p. motor, the General Electric 5 h. p. motor were also houses. The Allis-Chalmers 125 h. p. motor was outside the store house covered

with sheet iron. The Allis-Chalmers 125 h. p. slip link motor was in the Lincoln shaft hoist house and exposed. There was no protection for the Allis-Chalmers 100 h. p. centrifugal pump motor. The Fairbanks-Morse 5 h. p. motor was off of the property.

During the period from June 4, 1936, I was in charge of the property, engaged in prospecting, also repaired the mill and was a watchman. The nearest residence or occupied place is Pearl, about 1½ miles from this mining group. In the winter time I removed snow from the buildings. There is one tank pump which is not on the property and which I consented to being taken away. The mining work that I have done on the property was done with powder, steel, hammers and hand tools, and these were furnished, in addition to the tools that I have heretofore described with reference to plaintiff's exhibit No. 12, by the Huron Holding Corporation. It furnished power, timbers, rails, steel, saws, hammers, levels and other miscellaneous tools. I kept the various buildings locked while I was in charge, excepting the mill. When I found anything I could use in development work, I used it. The man there with me and I drove the tunnel about four hundred feet. I am sinking winces at the present time, close to the vein which is cut above in the tunnel. Mr. Phillips was on the property several times. I refused to allow him on the property in 1934, but after that did not refuse him. He never asked for any property excepting on June 4, 1936, when he was in with Mr. Langroise.

CROSS EXAMINATION

I refused him permission to take any of the property at that time. I knew there was a dispute in the latter part of 1934 as to the personal property, but I did not know what property was in dispute. I had a copy of the Alexander Lewis inventory, and I knew the property listed there, supposed to belong to Alexander Lewis. I knew as early as 1934, there was a dispute as to the other property, machinery and equipment upon the property which included the mill, general mining equipment, assay office stuff, household stuff and all outside and other stuff. When I bought powder, lumber, steel and other materials used in development work I charged it to myself. I sent invoices of the powder that I purchased back to Huron Holding Corporation and they paid the bill. I tried to get the people I was buying materials from to deal directly with Huron Holding Corporation and get their pay, but I found out that anybody connected with Lincoln Mines did not have good credit, so I had to go and get it myself and guarantee the pay and I had to have my credit rating looked up before I could get it. The Huron Holding Corporation furnished me with a petty fund. Huron Holding Corporation paid for miscellaneous equipment. I had an idea from what I heard what was claimed to be Lincoln Mines Operation Company property.

WILLIAM A. HOPPER, a witness on behalf of

the defendant, after being sworn, testified as follows:

My name is William A. Hopper. I am President and General Manager of the Gem State Electric Company with which I have been connected since 1920. Prior to that time I was for ten years general foreman for B. J. Hetherington Electric Company. I have had 27 years experience with motors. In 1933 I became acquainted with the motors on the Lincoln Mines Group. I have been selling motors personally since 1920 and with the other firm for ten years prior to that. About 35% of our business is buying and selling motors and I am familiar with the market price of motors in Boise and vicinity. I went around and took a look at them and tested them a little bit here and there and made some notations. I was up there this morning about 10 o'clock. I went around and took a look at the motors and tested them a little bit here and there and made some notations. I am familiar with the market value of these motors as of the period beginning June 4, 1936, and ending October 15, 1937. In my opinion, the reasonable market value of the motors is as follows:

1 h. p. Fairbanks-Morse motor	$ 10.00
125 h. p. Allis-Chalmers	400.00
15 h. p. General Electric	60.00
75 h. p. U. S. Motor	225.00
5 h. p. General Electric	30.00
15 h. p. Westinghouse	75.00
3 h. p. Westinghouse	20.00

30 h. p. Westinghouse	160.00
3 h. p. General Electric	20.00
15 h. p. General Electric	45.00
50 h. p. Westinghouse	200.00
7½ h. p. General Electric	40.00
75 h. p. Allis-Chalmers	180.00
100 h. p. Allis-Chalmers	no value
1½ h. p. Wagner single phase motor	15.00

CROSS EXAMINATION

I was examining the motors for about an hour. I would not pay the amount I estimate as the value for the motors, but would expect that price from some one wanting them. A motor that has been used for a period of a year or less is worth about 50% of the list value if it is in fair condition. I did not check the name plates or serial numbers of the motors. As far as the motors are concerned, I would prefer a new one, but there are some types of used motors that have more value than others. Ordinarily they rate about 50 per cent of the list value straight through. If I want a motor of a particular speed and type, that would make a difference in what I paid. I did not see the Allis-Chalmers induction motor, 75 h. p., 550 r. p. m., 440 volts, 60 cycles, three-phase. I really don't know if I found out there an Allis-Chalmers induction motor, 100 h. p. three phase, 60 cycle, 115 amp. 440 volts, 1750 r. p. m. serial No. 223BS823, but I did find a 100 h. p. Allis-Chalmers motor. I just tried to identify the motors on the list that I

had. The value of a motor depends somewhat upon the r. p. m. rating. As the r. p. m. decreases, the value goes up. The value increases from about 1800 r. p. m. and as you go down from that, the price increases. I found a U. S. 75 h. p. motor but I do not know the serial number, the voltage or the r. p. m. I found a General Electric 5 h. p. motor, but I did not get the serial number or the model. I found a Westinghouse 3 h. p. motor but I did not take the serial number or identify numbers or marks. I haven't any idea about the motors or the other information on the motors. I just checked the condition and paid no attention to anything else. I didn't see any Westinghouse 5 h. p. motor. Mr. Turner pointed the motors out to me.

REDIRECT EXAMINATION

I did not particularly examine the electric starting equipment. I did examine a few switches, but not in detail. A few automatic starting devices carry the same relative value as the motors, that is 50% of the list price less the cost of reconditioning. If we were buying them, we would buy this equipment as cheaply as we could. Some of these switches cease to have any value, but the rest have a base value of 50% of the list.

W. I. PHILLIPS, called by the defendant for cross examination under the statute, having been previously sworn, testified as follows:

CROSS EXAMINATION

During the period of time after the Lincoln Mines had abandoned the Lincoln Group in 1929 I did not remove any machinery. Whatever property the plaintiff had was left right on the Lincoln Group, by me as President. I did not employ a watchman to care for or look after it. I did not pay any taxes or insurance that I know of. That situation remained the same and was true until the time possession was taken of the Lincoln Group from the Ojus. The plaintiff had no other property in Idaho and was formed for the purpose of operating the Lincoln Group. After the plaintiff gave over the property under its option, the Ojus made some settlement with Chapman whom they had employed, for taxes, insurance and watchman on the property, but I don't know who paid him other than that. I was never billed by Lewis or the Manufacturers Trust Company for insurance or taxes or cost of watchman's services.

J. L. FOZARD, called as a witness for the defendant, after being duly sworn, testified as follows:

I am J. L. Fozard of Roseland, New Jersey, and am Vice-President of the Manufacturers Trust Company and a director of Huron Holding Corporation. I was employed from the fall of 1932 by the Manufacturers Trust Company up to May of 1935 and was then made Vice-President of the Manufacturers Trust Company. Up to the time I went to New York

I was in the mining business as a miner and engaged in all types of work as a miner, a foreman, superintendent, general manager, in fact, practically every position you find in connection with mining, both hard rock and placer mining. I first became acquainted with the Lincoln Group of Mines in the early part of 1932, about May. My duties in connection with the Lincoln Group—I have been advising the Huron Holding Corporation relative to trying to find some ore out there. I have not run the mill or any ore through the mill since the Ojus possession ceased nor recovered any ore or run any in the mill. Neither the Manufacturers Trust Company nor the Huron Holding Corporation have any interest in Idaho other than the Lincoln Group. I am familiar with their property and if there was any other mining operations I would be familiar with that. These companies do not carry on any mining operations other than are carried on at the Lincoln Mine in Idaho.

"Q. Are they carrying on any mining operation or mining business, to your knowledge, excepting in Idaho?

A. You mean in some other state?

Q. Yes; any where?

A. The Huron Holding Company has an item they are carrying on an abandoned coal mine in,—

MR. CASTERLIN: The question is, has it any other mining operations?

Q. Do they carry on any other mining operations other than those carried on at the Linclon Mine in Idaho? Do they carry on any other operations in any other state?

A. No, sir; I would say no."

EXAMINATION BY MR. LANGROISE

I went to work for the International Industrial Company which was liquidating a number of ventures in the fall of 1931 under the direction of officers of Huron Holding Corporation, and some were with the Manufacturers Trust Company, although I was paid by the International Industrial Securities. Huron Holding Corporation was organized in the early part of February, 1932. I had no connection with the Lincoln Mines Operating Company or the Lincoln Mines prior to the time I went into the employ of the Manufacturers Trust Company in 1932.

DIRECT EXAMINATION RESUMED

"Q. Have you any knowledge, independent of the record knowledge, that is, have you any knowledge of your own as to whether either the Manufacturers Trust Company, or the Huron Holding Company made any payment of taxes, or for the services of the watchman or insurance on this personal property left on the Lincoln group of mines?

A. The Manufacturers Trust Company paid

it up to the time the Huron Holding Corporation was formed, and the Huron Holding Corporation paid it thereafter."

EXAMINATION BY MR. CASTERLIN

I got this information at meetings. I was told this. I got the information as to taxes paid by the Huron Holding Corporation from what I was told at meetings of that company. I came into charge of the Lincoln Mines about May, 1932. The taxes were paid by the Huron Holding Corporation in the regular course of business. It kept a set of books. I did not draw the checks or keep the bank books. The checks were usually sent to me with a note of transmittal and I forwarded them. I don't know whether the checks were paid. I never saw the cash books to see whether the cash was charged with the checks. I mailed the checks. I assumed the checks were cashed. The taxes included the five claims and the improvements. Some of the improvements belonged to the plaintiff and some did not. Some personal property belonged to the plaintiff. I knew there was some property of the plaintiff, but there was no segregation of the amount of the taxes. As I recall the tax notices, they were for improvements which belong to the group of mines. I assume that the mining equipment belonging to the plaintiff was listed under improvements on tax notices. That is my interpretation. I don't know as the taxing officers interpreted it that way. I just mailed the checks for some taxes to the col-

lector. The Manufacturers Trust Company paid the watchman at the property up to the time of the organization of the Huron Holding Corporation and the latter paid from the time it was abandoned by the plaintiff. I know that from reading correspondence and also being instructed by officers at the meetings. I did not handle the checks. I read the correspondence that they were forwarding the check to the watchman and also received his acknowledgment of receiving the check. I was on the property about March or April, 1932, making a trip to Carson and I was asked to come up here and the Huron Holding Corporation paid my expenses from Ogden up and back to Ogden. I was asked to report what they had and I reported the general surface conditions of the mine. I did not list the mill and machinery or report its general condition. There was a watchman there by the name of Chapman. I did not ascertain what property belonged to the Manufacturers Trust Company. I wrote the report of what was reported as the Alexander Lewis property about the time the Ojus Mining Company took the lease and bond on it, and at that time I had a list of the property belonging to Lewis signed by Phillips. I read the list attached to the agreement between Ojus Mining Company and Alexander Lewis. I do not recall what that list showed as to the claim of personal property. I saw the Lewis list and read it and knew that some belonged to the plaintiff. Afterwards in the fall of 1932 when the Ojus was operating I saw the prop-

erty. I was out there in 1933 after Mr. Phillips had quit.

I knew in a general way what personal property there was then on the property, but not specifically. I did not have an occasion to learn specifically each item. According to the inventory by Mr. Phillips, there was some Lewis property and some plaintiff's property there in 1933. In discussing the personal property at the Lincoln Group, I classified it in a general way as the Lewis property and other personal property as the plaintiff's property. In a general way I had an idea of the Lincoln Mines and the Lewis property. While watchman's expenses were being paid there was property belonging to Huron Holding Corporation and Manufacturers Trust Company that required the use of a watchman as well as other property and it required no more physical exertion on the part of a watchman to watch the plaintiff's property than it did to watch the property of the Huron Holding Corporation.

Alexander Lewis held mining property in other states the same way as he held mining property in Idaho. I have been in charge of the real estate department for over two years and am familiar with the mining operations of the Manufacturers Trust Company and the Huron Holding Corporation. The former is a banking corporation, doing a general banking business in New York. It owns certain mortgages which they service and liquidate. As far as mining interests are concerned, they have collateral in their

possession which they try to liquidate. These collateral activities they have in other states as well as in Idaho.

REDIRECT EXAMINATION.

"MR. HAWLEY: I desire to offer as Exhibit No. 17 and No. 18 a chattel mortgage from the Lincoln Mines Operating Company to Mr. Phillips, and as assignment by William I. Phillips to Helen S. Pearson. These are copies which I have here.

MR. CASTERLIN: That is objected to, that is, both of the offers, as being incompetent, irrelevant and immaterial.

THE COURT: Where they issued prior to June 4th, 1936?

MR. HAWLEY: Yes.

THE COURT: What relevancy have they here?

(Argument of counsel.)

THE COURT: The objection will be sustained.

MR. HAWLEY: May we have an exception?

THE COURT: You may have your exception."

The defendants offered Exhibit No. 17, which is as follows:

"CHATTEL MORTGAGE

THIS MORTGAGE, Made this 1st day of September, in the year of our Lord one thousand nine hundred and twenty-seven, by the Lincoln Mine Operating Company, a corporation duly organized and existing under the laws of the State of Idaho, the party of the first part to William I. Phillips of Miami, Dade County, Florida, the party of the second part, WITNESSETH:

That the said party of the first part, having been hereunto duly authorized by resolution of its Board of Directors, hereby mortgages to said party of the second part that certain machinery and personal property belonging to the party of the first part located in and upon what is known as the Lincoln Group of Mines situated in Gem County, Idaho, to-wit:

One No. 64½ Marcy Ball Mill
One Dorr Drag Classifier
One Farhrenwald Oscalating Classifier
Two McIntoshe Neumatic Flotation Cells
One Flotation Cell Air Blower
One 75 cubic Air Compressor
One 35 cubic Air Compressor
One Dorr Thickner 8x10 complete with Mechanism
One Dorr Dewatering Tank and Mechanism
One Portland Filter, 8x8
One 75 H.P. Electric Motor

Two 15 H.P. Electric Motors
One 10 H.P. Electric Motor
One 5 H.P. Electric Motor
Two 3 H.P. Electric Motors
One Dodge Sedan; Motor No. A32601, Serial No. A 904309, Idaho 1927 License No. 77741

Together with any and all other personal property belonging to the party of the first part, either mentioned herein or not, used in connection with the working and operation of said Lincoln Group of Mines;

And also any and all machinery and personal property added to the above described machinery and personal property, and hereafter acquired by the said party of the first part for use in the working and operation of said Lincoln Group of Mines;

to secure the payment of Forty-five Thousand ($45,000.00) & No/100 Dollars, according to the terms and conditions of one certain promissory note, in words and figures as follows, to-wit:

$45,000.00 Boise, Idaho, September 1st, 1927

On or before January 1st, 1929, after date, the Lincoln Mine Operating Company, a corporation for value received, promises to pay to the order of William I. Phillips Forty-five Thousand ($45,000.00) & No/100 Dollars at the Pacific National Bank, Boise, Idaho, in

Gold Coin of the United States of America, with interest thereon in like Gold Coin from date until paid at the rate of eight per cent per annum, interest payable at maturity.

And in case suit is instituted to collect this notice, or any portion thereof, the said corporation promises to pay such additional sum as the Court may adjudge reasonable as attorney's fees in such suit.

The maker, sureties, indorsers, and guarantors of this notice hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest.

IN TESTIMONY WHEREOF, the Vice-President and the Secretary of said corporation, under authority of a resolution adopted by its Board of Directors, have hereunto signed the name of the corporation and affixed its corporate seal.

(SEAL) LINCOLN MINE OPERATING COMPANY
By Henry W. Dorman,
Vice-President

ATTEST: Henry O. Dorman,
Secretary

It is also agreed that if the said party of the first part shall fail to make any payment as in said promissory note provided, then at the option

of said party of the second part, his executors, administrators or assigns, the said note shall immediately become due and payable and said party of the second part may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds to pay the whole amount in said note specified, and all costs of action or sale, including a reasonable sum as attorney's fees, paying the surplus to the said party of the first part.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed by its Vice-President and its corporate seal to be affixed hereto and these presents attested by its Secretary, the day and year first above written.

(CORPORATE SEAL)

LINCOLN MINE OPERATING COMPANY

By Henry W. Dorman,
Vice-President

ATTEST: Henry O. Dorman,
Secretary

STATE OF IDAHO,)
COUNTY OF ADA.) ss.

Henry W. Dorman, Vice-President of the Lincoln Mine Operating Company, a corporation,

the mortgagor in the foregoing mortgage, deposes and says: That the foregoing mortgage is made in good faith and without any design to hinder, delay or defraud creditor or creditors.

Henry W. Dorman

Subscribed and sworn to before me this 7th day of September, 1927.

(SEAL) L. L. Sullivan
Notary Public for Idaho
Residing at Boise, Idaho.

STATE OF IDAHO,)
COUNTY OF ADA.) ss.

On this 7th day of September, in the year 1927, before me, L. L. Sullivan, a Notary Public in and for said State, personally appeared Henry W. Dorman, known to me to be the Vice-President of the Lincoln Mine Operating Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year in this certificate above written.

(SEAL) L. L. Sullivan
Notary Public for Idaho
Residing at Boise, Idaho.

STATE OF IDAHO,)
COUNTY OF GEM.) ss.

I hereby certify that this instrument was filed for record at request of N. Eugene Brasie at 35 minutes past 10 o'clock A. M., this 10th day of September, 1927, in my office, and duly recorded in Book 2 of C.M.R. as #4560.

Lillian M. Campbell
Ex-Officio Recorder

Fees, $ .50 cts.

STATE OF IDAHO,)
COUNTY OF GEM.) ss.

I, Lillian M. Campbell, Ex-Officio Recorder in and for Gem County, State of Idaho, do hereby certify that the foregoing is a full, true and correct copy of the original Chattel Mortgage No. 4560, executed by Lincoln Mine Operating Company to William I. Phillips, dated September 1st, 1927, and filed in this office at 10:35 o'clock A.M., the 10th day of September, 1927.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 3rd day of July, 1936.

Lillian M. Campbell
Ex-Officio Recorder
Gem County, Idaho"

(SEAL)

The defendants offered Exhibit No. 18 which is as follows:

"This agreement made and entered into this the 6th day of August, A. D. 1929, by and between William I. Phillips of the County of Dade and State of Florida, party of the first part, and Helen S. Pearson, of said County and State, party of the second part;

WITNESSETH: That whereas the Lincoln Mine Operating Company, a corporation organized under the laws of the State of Idaho, did execute and deliver a certain chattel mortgage to the party of the first part on all of its machinery and equipment that it did own at the time of the execution of said chattel mortgage and any machinery and equipment it may become possessed of in the future;

And whereas the said chattel mortgage was delivered to the said party of the first part by the said Lincoln Mine Operating Company to secure the said party of the first part for the payment of certain money that the said party of the first part had loaned to the said Lincoln Mine Operating Company;

And whereas the said party of the second part has made certain loans to the said Lincoln Mine Operating Company and the said party of the first part desires to secure the said party of the second part for the payment of all loans made by

the said party of the second part to the Lincoln Mine Operating Company and on any loans the said party of the second part may make to the said Lincoln Mine Operating Company in future.

NOW, THEREFORE, In consideration of the sum of One ($1.00) Dollars each to the other in hand paid, and in the further consideration of the sum of Six Thousand One Hundred ($6,-100.00) Dollars, which the said party of the second part is about to loan to the said Lincoln Mine Operating Company, the said party of the first party hereby assigns, sets over and transfers unto the said party of the second part, all of his right, title and interest in and to the said chattel mortgage for the purpose of securing the party of the second part for the loan of Six Thousand One Hundred ($6,100.00) Dollars that the said party of the second part is now making, and all loans that have been made in the past or any loans that may be made in the future by the said party of the second part.

This agreement and assignment is made obligatory upon the heirs, executors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and affixed his seal this the day and year above written. William I. Phillips (Seal)

Signed, sealed and
delivered in the
presence of us:
Lora M. Wilson
M. E. Howell

STATE OF FLORIDA,)
COUNTY OF DADE.) ss.

Personally appeared this day before me, an officer authorized to take acknowledgements, William I. Phillips, who being sworn deposes and says that he executed the foregoing assignment of chattel mortgage for the purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Miami, Dade County, Florida, this the 6th day of August, A. D., 1929.

Helen M. Haynes
Notary Public
State of Florida at Large

(SEAL)
My commission expires: Dec. 13, 1932

STATE OF IDAHO,)
COUNTY OF GEM.) ss.

I hereby certify that this instrument was filed for record at request of M. W. Hallam at 30 minutes past 11 o'clock A. M., this 20th day of

November, 1929, in my office, and duly recorded in Book 2 of Bonds and Agreements, page 426.

Lillian M. Campbell
Ex-Officio Recorder

Fees, $1.20

STATE OF IDAHO,)
COUNTY OF GEM.) ss.

I, Lillian M. Campbell, Ex-Officio Recorder in and for Gem County, Idaho, do hereby certify that the foregoing is a full, true and correct copy of agreement and assignment executed by William I. Phillips to Helen S. Pearson as the same appears on page 426 of Book 2 of Bons and Agreement Records of Gem County, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 3rd day of July, 1936.

Lillian M. Campbell
Ex-Officio Recorder
Gem County, Idaho "

"MR. HAWLEY: And We have nothing further.

THE COURT: Does the defendant rest at this time?

MR. HAWLEY: The defendants rest.

MR. CASTERLIN: And we have no rebuttal."

MR. HAWLEY: I move for a directed verdict on behalf of Huron Holding Corporation on the ground that it has not been properly served with summons and complaint in accordance with the laws of the State of Idaho; that it has never been in the jurisdiction of this court. It has not been doing business, and was not doing business in the state at the time of the attempted service upon it.

Motion for directed verdict on the same ground was made on behalf of Manufacturers Trust Company.

Motion for directed verdict was made on behalf of the defendant, Fred J. Turner, for the reason that the evidence did not show he was in any way liable for damages, had filed a disclaimer, and the property has been returned.

> "THE COURT: I understand this lawful detention, — or, rather, I should say the unlawful detention is claimed to be between June 4th, 1936, and October 15th, 1937. You are suing for unlawful detention of property, and these two foreign corporations, — now, let me ask, were they under the evidence here doing business in the State of Idaho in the sense in which the constitution and the state laws apply in order to give this Court jurisdiction? The holding of title to property by a foreign corporation would not be doing business. I understand we must go further to determine that; that they must have done some act to show that they were functioning, and doing

business in the state."

"THE COURT: Do you agree the first demand was made on June 4th, 1936, on Mr. Turner, and that he declined to give possession?

MR. CASTERLIN: It is a matter of stipulation that on June 4th, 1936, demand was made on the owner or owners of this property."

"THE COURT: I will state to counsel that the only thought I had is the relation between these two companies, the Huron Holding Corporation and the Manufacturers Trust Company at the time it is claimed that this property was unlawfully held between June 4th, 1936, and October 15th, 1937. Now, the only thing is this question of jurisdiction. We have to dispose of that first. If we haven't any jurisdiction then we haven't any power to go ahead and determine the question as to the values or anything of that kind. Was the Huron Holding Corporation representing the Manufacturers Trust Company? I think, perhaps, there is sufficient evidence to go to the jury. They were employing men, paying the bills, and so on. It is a question of connection between the two companies. Whether that is sufficient to keep jurisdiction in this case, I will say to counsel that you have clarified a lot of things that disturbed me considerably, and I think I will take a recess at this time until two o'clock, and will take the matter under advisement until then."

"THE COURT: The principal question presented upon the motions of the defendants for directed verdict goes to the question of jurisdiction of this Court, which must now be disposed of, and being upon the evidence this inquiry requires an analysis of the testimony as to whether the defendant Manufacturers Trust Company, a foreign corporation, was doing business in the state of Idaho at the time it is alleged and stipulated that the personal property was unlawfully detained from the possession of the plaintiff, viz: between June 4th, 1936, and October 15th, 1937, when final demand for possession was made upon the defendant Turner. The evidence discloses that between these dates the defendant Huron Holding Corporation employed the defendant Turner who was in charge of the Lincoln Mines upon which the personal property was, and in whose name all of the acts as to the operation, the contract, the accounts, the payment of bills, and all such in connection with the mines were done. Prior to that time, on February 9th, 1932, an assignment, which is disclosed by plaintiff's exhibit No. 3, was executed between the Manufacturers Trust Company and the Huron Holding Corporation, in which the Manufacturers Trust Company for a valuable consideration, set over, sold, transferred and assigned unto the Huron Holding Corporation the Lincoln Mines and certain other securities and mortgages, and other personal prop-

erty, and in this assignment, certain conditions appear, viz: It is expressly understood and agreed and is a condition hereof that said Huron Holding Corporation, its successors and assigns, shall in no event have any recourse against the said Manufacturers Trust Company, its successors or assigns, for any sum of money, interest, claim or other charge on account of or arising out of the assignment by said Manufacturers Trust Company to said Huron Holding Corporation of the stocks, bonds, notes, debentures, mortgages and other securities, and/or the subordinate right or interest therein, more fully described on said Schedule B attached hereto and made a part hereof, except such moneys as shall have actually been received by said Manufacturers Trust Company for the account of said Huron Holding Corporation pursuant to the following paragraph.

'As to any subordinate right or interest covered hereby it is further expressly understood and agreed, and it is a condition hereof, that Manufacturers Trust Company, its successors and assigns, shall have, and does hereby retain full power and authority, either in its own name or in the name of said Huron Holding Corporation, its successors or assigns, to demand, collect, institute legal proceedings for and to receive any and all sums of money which are or shall become due, owing and payable by any and all persons whatsoever, and to adjust and compromise any and all

claims which may be disputed in good faith and on account of or arising out of the stocks, bonds, notes, debentures, mortgages or other securities in which any subordinate right or interest is hereby sold, assigned or transferred.

'It is further expressly understood and agreed and is a condition hereof that Manufacturers Trust Company, its successors and assigns, will upon request of said Huron Holding Corporation execute, acknowledge and deliver, and will cause to be done, executed, acknowledged and delivered, all such further acts, assignments, transfers and further assurances of title and such additional instruments as Huron Holding Corporation shall reasonably require for the better assuring, transferring, confirming and assigning unto said Huron Holding Corporation the property, or any part thereof, hereby sold, assigned, transferred and set over, or intended so to be.'

As to the execution of the assignment which I have just referred to, the Manufacturers Trust Company owned the Lincoln Mines there. From that date it does not appear that the Manufacturers Trust Company performed any act, unless it is concluded that it did so by and through the Huron Holding Corporation. This brings us to a consideration of the principal question of facts: Was the Huron Holding Corporation representing or acting for the Manufacturers Trust Com-

pany at the time it is charged that the personal property involved here was wrongfully detained from the possession of the plaintiff? Prior to that time there were certain acts which took place with the Manufacturers Trust Company, but the inquiry now is: Did the relationship, if any existed, continue between these companies after February 9th, 1932? If none did exist, then the Manufacturers Trust Company had the right to transfer and sell the property to a holding company under conditions specified in the exhibit, and it became released from any act or conduct in the future, and any refusal to deliver possession of the personal property here involved when it had no interest in the personal property. The law recognizes the right of one to sell its property to a holding company. If one deals thereafter with the holding company, the transferer will not be liable for the acts or conduct of the holding company, such as we are considering here, namely, the refusal to deliver the property, or other acts other than the transfer to the holding company. The evidence does not show that at the time final demand for possession of the property here involved was made on June 4th, 1936, and until October the 15th, 1937, that the Manufacturers Trust Company was doing business within the state of Idaho, as the business here claimed to have been done between June 4th, 1936, and October 15th, 1937, and since the assignment was made on February 9th, 1932,

was by the Huron Holding Corporation. Thereafter the evidence produced here fails to show that the Manufacturers Trust Company was doing business in the State of Idaho, and the Court is without jurisdiction as to the defendant Manufacturers Trust Company, and the action as to it will have to be dismissed.

As to the defendant Huron Holding Corporation the evidence shows that at the times involved herein as to the unlawful detention of this property, and at the time the demand was made the Huron Holding Corporation was doing business within this state under the law, and it will be continued as to that defendant, and there is sufficient evidence to go to the jury on that.

As to the defendant Turner the evidence discloses that he was employed by the Huron Holding Corporation and was acting for that company, which I understand, is admitted, and I understand it is admitted that he is not liable. Therefore, the action is dismissed as to him.

I understand that the defendant Lewis has died since this action was commenced, and no substitution of any legal representative has been made. The result is on this ruling the defendant Manufacturers Trust Company is dismissed for want of jurisdiction, and the action is dismissed as to the defendant Turner; and that the action continues as to the defendant Huron Holding Cor-

poration, as the Court holds that it has jurisdiction as to it, and there is sufficient evidence to go to the jury as betwen the plaintiff and that defendant.

MR. LANGROISE: And may we have an exception as to the ruling of the Court on the dismissal of the Manufacturers Trust Company?

THE COURT: It will be allowed.

MR. HAWLEY: And may we have an exception as to the Court's holding and refusal to dismiss as to the Huron Holding Corporation?

THE COURT: You may have your exception. You may call the jury.

(The following proceedings were had in the presence of the jury:)

THE COURT: After hearing the motion of the defendant Manufacturers Trust Company the Court has sustained their motion and has granted the motion, ruling that it has no jurisdiction in the action as against that defendant, and it has also dismissed the action as to the defendant Turner, and the action continues for your consideration as to the defendant Huron Holding Corporation. You will also remember that the defendant Alexander Lewis has died, and that no substitution of any party has been made, and there remains for consideration by you in this case now as to the issues between the plaintiff and the defendant Huron Holding Corporation."

INSTRUCTIONS TO THE JURY.

THE COURT: Gentlemen of the jury: As you doubtless understand, the investigation in which we have been engaged involved the question of whether or not the plaintiff is entitled to recover the reasonable market value and the rental value of the personal property described in the complaint; and I hardly need say to you that after listening to the trial of the case and the arguments of counsel, it is necessary to recall ourselves to the precise nature of our duty and responsibility as jurors and judges, that responsibility being to decide the issues and controversies fairly from the evidence and under recognized principles of law. The function you perform in cases of this kind, — the duty you perform is an important and necessary one. When you go to your jury room and come to consider your verdict you will law aside all suggestions which merely appeal to your feelings or prejudice or emotions, regardless of from which side they may have come in the case, and pass on it. Sometimes incidents inadvertently come into the trial of a case which really have no bearing upon it, and unless we are careful our judgment may be somewhat disturbed thereby. So when you come to the consideration of what your verdict should be you should be careful to confine that consideration to the evidence and all of the circumstances in evidence, and only the fair and legitimate inferences that may be drawn therefrom.

Now, the plaintiff alleges in substance in its com-

plaint that it is now and at all times mentioned in the complaint duly organized and existing under and by virtue of the laws of the State of Idaho; that the defendant Huron Holding Corporation is now and at all times mentioned in the complaint organized and existing by virtue of the laws of the State of New York, and has for more than a year last past been doing business in the County of Gem, State of Idaho, and that it does not have any designated person actually residing in Gem County, Idaho, or within the State of Idaho, upon whom process can be served; that the plaintiff was the owner and entitled to the possession of the personal property mentioned and described in the complaint which was at all of the times mentioned in the complaint situate in and upon that certain group of lode mining claims commonly known as Lincoln Mines in the West-View Mining District, in Gem County, Idaho, and that the reasonable value thereof is $55,000.00; that on or about the fourth day of June, 1936, and before the commencement of this action the defendant Huron Holding Corporation having possession of the property, the plaintiff demanded of the defendant Huron Holding Corporation possession of the personal property, but defendant refused and still refuses to deliver possession thereof to the plaintiff, and that said personal property has been and now is wrongfully detained by the defendant Huron Holding Corporation, and that the cause of the detention thereof by that defendant is unknown to the plaintiff, and that the personal property has not been taken for taxes,

assessment or fine pursuant to any statute, or seized on execution or attachment against the property of the plaintiff; that by reason of the facts alleged in the complaint plaintiff has been damaged by the defendant Huron Holding Corporation in the sum of $55,000.00, the value of the said property, and in the additional sum of $100.00 per day for each and every day so wrongfully detained by the defendants.

The defendant Huron Holding Corporation takes issue with the plaintiff and in its separate answer alleges in substance: It denies the allegations set forth in paragraph two of the complaint, and that for more than a year last past it was doing business within Gem County, Idaho, and denies the allegations set forth in paragraph three, four and six of the complaint, and for an affirmative defense it alleges that the plaintiff, if it ever had any right, title and interest in and to the property described in the complaint, or any part thereof, did voluntarily abandon and surrender both title and possession thereof prior to three years before the commencement of this action, and prays that the action be dismissed.

Having disposed of these matters relating to the pleadings, let us address ourselves to a further consideration of certain principles of law which seem applicable to the issues and the evidence. The essential facts insofar as they are not admitted either by the pleadings or in the trial must be proved by satisfactory evidence, either positive or circumstantial, and a ver-

dict having no basis other than surmise or conjecture is unwarranted.

The plaintiff seeks to recover in this case on the contention that its personal property was unlawfully detained from it and therefore it was damaged.

It is a principle of law that if one takes personal property of another, or detains possession unlawfully and without the consent of the owner, he is liable to the return of the personal property to the owner, and in case a return was not made, the reasonable market value thereof after demand for the return of the property has been made.

The action is brought under the statute of the State of Idaho, and is commonly known as a claim and delivery statute, which permits the owner of the property to sue for the recovery of it, and if it is found that he is entitled to the return thereof, and return is not made after demand, the jury must find the market value of the property, and assess damages if any are proven by reason of the taking or detention of the property.

I will say to you further that if the owner or owners of the Lincoln Mines group of claims is found to be a bailee of the personal property found to belong to the plaintiff then the rule of law is that if they once had possession of the personal property the owner or owners of the Lincoln Mines group of claims are liable to the plaintiff for the personal property, unless they prove that possession of the personal property was lost

by accident or by some means beyond their control.

You are instructed that from the 4th day of June, 1936, if a demand was made upon the defendant Huron Holding Corporation for possession of the property that the plaintiff is entitled to damages for the detention and use of the personal property which was then in that defendant's possession, and the burden of proving what property was then in the defendant's possession is upon the plaintiff, as well as the burden of proving the amount of damages for the detention of the property is also upon the plaintiff.

I will say to you further that when in considering what property that is involved in this suit you will only consider the personal property mentioned and described in the complaint which you will observe therefrom, and not any additional or different property that may appear by the evidence, and I call to your attention the description of the property appearing in plaintiff's exhibit No. 12, for should there appear in that exhibit, or by any other evidence, additional or different property than that mentioned and described in the complaint, you should disregard it and confine your consideration to the property mentioned and described in this complaint. In this connection I am going to allow the complaint and answer to go to the jury room.

Now, the measure of plaintiff's damages for wrongful detention of the property is, if you find such to be the case, if the property had a usable value, the rea-

sonable value of the use of such property for the time of the wrongful detention to this date; if it had no usable value then interest at the rate of six per cent per annum upon its value at the date of wrongful detention from such date to this date, and this fact you are to determine from the evidence.

In determining plaintiff's damages for the unlawful detention of the personal property by the owner or owners of the Lincoln Mines group of claims you should consider the reasonable market value of the use or the reasonable rental thereof, and you should determine from a preponderance of the evidence what that reasonable rental value is, and fix the same, and in this connection if you find from a preponderance of the evidence that there was a reasonable market value for the personal property it makes no difference whether the defendant Huron Holding Corporation or the owner or owners of the group of mining claims ever used or had any use for such or any of such personal property.

Further, in determining the reasonable market rental value as in these instructions defined it makes no difference whether or not the owner or owners of the Lincoln Mines group of claims had any use or did in fact use any of the personal property during the period of the unlawful detention which is admitted to be from June 4th, 1936, to October 15th, 1937.

In determining plaintiff's claim for damages for the unlawful detention of such personal property you are

to consider all of the evidence produced in the case.

The reasonable value of the use of such property is to be estimated by the ordinary market price of the use of such property in the vicinity where said property is so situate.

The defendant admits that the owner or owners of what has been referred to in the trial as the Lincoln Mines group of claims located in West-View Mining District, Gem County, Idaho, were in the unlawful possession of the personal property of the plaintiff from June 4th, 1936, to October 15th, 1937, and I now instruct you that as a matter of law the plaintiff is entitled to recover from the owner or owners of such mining group of claims who refused possession of the personal property on June 4th, 1936, if you find such refusal occurred, the personal property, or in lieu thereof, the reasonable market thereof at the time of the unlawful detention, together with the reasonable market value of the use of the property during the period of detention from June 4th, 1936, to October 15th, 1937.

I will say to you further that the owner or owners of the Lincoln Mines group of claims has admitted that the personal property belonging to the Lincoln Mines Operating Company, the plaintiff herein, has been by such owner or owners unlawfully detained from June 4th, 1936, to October 15th, 1937, and therefore you are instructed that the plaintiff, as a matter of law, is entitled to recover for such unlawful detention.

If you find from a preponderance of the evidence that the personal property unlawfully detained by the owner or owners of the Lincoln group of claims has a rental value in the vicinity of Boise, Idaho, where the property is situate, you should return a verdict for the plaintiff for such reasonable market rental thereof.

The plaintiff in this action has alleged that it suffered a damage of $100.00 per day by reason of the unlawful detention complained of. The plaintiff is therefore limited in its damages, if any you award, to that sum for the period of detention, and no more.

In passing upon the issues in this case the burden is upon him who asserts the existence of a fact to establish it, and in a civil action of this kind to establish by a preponderance of the evidence. The burden, therefore, is upon the plaintiff in the first instance to show by a preponderance of the evidence the cause or causes of action set forth in its complaint, and in determining the credibility to be given the testimony of any witness you have a right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence in determining whether or not the witness has told the truth. Bring to bear your common sense and experience in hearing the testimony and passing upon the credibility of the witness.

Preponderance of evidence does not necessarily mean the greater number of witnesses. It means the greater

weight of the testimony or evidence before you taken as a whole. This is the meaning of preponderance of evidence as accepted by the law.

It is necessary in this Court that all of you agree in finding a verdict. Two forms have been prepared and will be handed to you; one you will use in case you find for the defendant, and there it will be necessary only for your foreman to sign it; in the other form a blank is left for the insertion of the amount of damages, and that one you will use in the case you find in favor of the plaintiff.

Let the bailiff be sworn, and you, gentlemen, may retire with the bailiff.

That the Court continued in session until July 28, 1938; whereupon the Proposed Bill of Exceptions of the defendant, Huron Holding Corporation, and the Proposed Amendments thereto of the plaintiff were considered by the Court, and the plaintiff's proposed amendments were adopted and the Court thereupon ordered the Bill of Exceptions as amended to be engrossed and presented for allowance. Whereupon, on the 9th day of August, 1938, the Court still being in session and both parties having been notified, the Honorable C. C. Cavanah, Judge of the above entitled Court, thereupon settled the Bill of Exceptions and made an Order to that effect.

I, CHARLES C. CAVANAH, Judge of the United States District Court for the District of

Idaho, before whom the above entitled action was tried,

DO HEREBY CERTIFY that the foregoing Bill of Exceptions contains all of the facts, matters, things, proceedings, rulings and exceptions thereto occuring only upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial but not including proceedings, evidence or bill of exceptions upon hearing of motion to quash, service of summons and/or dismissal, or with respect to service of summons, jurisdiction or doing business; and

I HEREBY CERTIFY, SETTLE AND ALLOW the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in the trial of this action and ORDER the same filed as a part of the record herein, AND DO FURTHER ORDER that the above and foregoing Bill of Exceptions is the Bill of Exceptions proposed, lodged, and served by the defendant, Huron Holding Corporation, as modified and amended by the plaintiff's proposed amendments thereto as allowed by me, the said Bill of Exceptions having been now duly engrossed by the defendant, Huron Holding Corporation, in the United States District Court for the District of Idaho, this 9th day of August, 1938.

CHARLES C. CAVANAH
District Judge.

(Service Acknowledged August 5, 1938.)

(Title of Court and Cause)

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS.

Filed April 25, 1938

It appearing that the court at the expiration of the trial of the above entitled action did grant the defendant, Huron Holding Corporation, a period of sixty days in which to prepare, serve and lodge its proposed bill of exceptions, and it appearing further that the said defendant will require further time, and good cause appearing therefor, and the parties having expressly so stipulated,

NOW, THEREFORE, IT IS ORDERED that the defendant, Huron Holding Corporation have to and including the 1st day of July, 1938, in which to prepare, serve and lodge its proposed bill of exceptions.

AND IT IS FURTHER ORDERED that the plaintiff have forty days from the date of service of said defendant's proposed bill of exceptions in which to file its proposed amendments thereto.

Dated this 25th day of April, 1938.

CHARLES C. CAVANAH, District Judge.

(Title of Court and Cause)

ORDER FOR EXTENSION OF TIME FOR FILING BILL OF EXCEPTIONS.

Filed June 28, 1938

Upon application of the defendant, **HURON HOLDING CORPORATION**, a corporation, and the stipulation of the parties thereto being filed, and good cause appearing therefor, **IT IS HEREBY ORDERED** that the defendant, Huron Holding Corporation, a corporation, shall have until and including the 20th day of July, 1938, in which to prepare, serve, and file its proposed Bill of Exceptions.

DATED this 24th day of June, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

PETITION FOR APPEAL.

Filed May 31, 1938.

COMES NOW, the above named defendant, Huron Holding Corporation, and says:

That on or about the 3rd day of March, 1938, this court entered a judgment against this petitioner and

defendant and in favor of the plaintiff, in which judgment and proceedings had thereunto in this cause certain errors were committed to the manifest prejudice of this petitioner, as more fully appears by the petitioner's assignment of errors which is presented and filed herewith. That all further proceedings of this court be suspended and stayed and that said judgment be superseded until the determination of this appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner feeling itself aggrieved by the said judgment entered herein hereby appeals from and petitions this court for an order allowing its appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors, and for the correction of the errors there complained of.

WHEREFORE, your petitioner prays that an appeal in its behalf from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit be allowed and that an order be made fixing the amount of security for costs and supersedeas of the said judgment to be given by the appellant conditioned as required by law and staying execution and enforcement of said judgment pending the final decision of said appeal, and that citation may issue as provided by law, and that a transcript of the record proceedings and papers in the said cause, duly authenti-

cated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit.

Dated at Boise, Idaho, this 27th day of May, 1938.

JESS HAWLEY,
OSCAR W. WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendant and
Petitioner, Huron Holding
Corporation.

(Service acknowledged May 27, 1938.)

(Title of Court and Cause)

ASSIGNMENT OF ERRORS.

Filed May 31, 1938

COMES NOW, Huron Holding Corporation, a corporation, defendant and appellant in the above entitled action, by its attorneys of record, and makes and files with its petition for appeal in this case this assignment of the following errors, which it asserts and intends to urge on said appeal:

ASSIGNMENT OF ERROR NO. 1.

The court erred in denying the motion of the defendant to quash service of summons and dismiss the action on the ground that the said defendant had not

been served with summons or complaint in any lawful manner.

ASSIGNMENT OF ERROR NO. 2.

The court erred in denying the said defendant's motion for a directed verdict in its favor on the ground that it had not been properly served with summons and complaint in accordance with the laws of the State of Idaho and was not within the jurisdiction of this Court and was not doing business in the State of Idaho at the time of the attempted service upon it.

ASSIGNMENT OF ERROR NO. 3.

The court erred in sustaining plaintiff's objection to defendant's testimony as follows, to wit:

"MR. HAWLEY: I desire to offer as Exhibit No. 17 and No. 18 a chattel mortgage from the Lincoln Mines Operating Company to Mr. Phillips and an assignment by William I. Phillips to Helen S. Pearson. These are copies which I have here.

"MR. CASTERLIN: That is objected to, that is, both of the offers, as being incompetent, irrelevant and immaterial.

"THE COURT: Were they issued prior to June 4, 1936?

"MR. HAWLEY: Yes.

"THE COURT: What relevancy have they

here?

(Argument of counsel includes agreement that no objection is to be made because the exhibits are copies instead of the originals)

"THE COURT: The objection will be sustained.

"MR. HAWLEY: May we have an exception?

"THE COURT: You may have your exception."

EXHIBIT NO. 17.

"CHATTEL MORTGAGE

THIS MORTGAGE, Made this 1st day of September, in the year of our Lord one thousand nine hundred and twenty-seven, by the Lincoln Mine Operating Company, a corporation duly organized and existing under the laws of the State of Idaho, the party of the first part to William I. Phillips of Miami, Dade County, Florida, the party of the second part, WITNESSETH:

That the said party of the first part, having been hereunto duly authorized by resolution of its Board of Directors, hereby mortgages to said party of the second part that certain machinery and personal property belonging to the party of the first part located in and upon what is known as the Lincoln Group of Mines situated in Gem

County, Idaho, to-wit:

One No. 64½ Marcy Ball Mill
One Dorr Drag Classifier
One Farhrenwald Oscalating Classifier
Two McIntoshe Neumatic Flotation Cells
One Flotation Cell Air Blower
One 75 cubic Air Compressor
One 35 cubic Air Compressor
One Dorr Thickner 8x10 complete with Mechanism
One Dorr Dewatering Tank and Mechanism
One Portland Filter, 8x8
One 75 H. P. Electric Motor
Two 15 H.P. Electric Motors
One 10 H.P. Electric Motor
One 5 H.P. Electric Motor
Two 3 H.P. Electric Motors
One Dodge Sedan; Motor No. A32601, Serial No. A 904309, Idaho 1927 License No. 77741

Together with any and all other personal property belonging to the party of the first part, either mentioned herein or not, used in connection with the working and operation of said Lincoln Group of Mines;

And also any and all machinery and personal property added to the above described machinery and personal property, and hereafter acquired by the said party of the first part for use in the

working and operation of said Lincoln Group of Mines;

to secure the payment of Forty-five Thousand ($45,000.00) & No/100 Dollars, according to the terms and conditions of one certain promissory note, in words and figures as follows, to-wit:

$45,000.00 Boise, Idaho, September 1st, 1927

On or before January 1st, 1929, after date, the Lincoln Mine Operating Company, a corporation for value received, promises to pay to the order of William I. Phillips Forty-five Thousand ($45,000.00) & no/100 Dollars at the Pacific National Bank, Boise, Idaho, in Gold Coin of the United States of America, with interest thereon in like Gold Coin from date until paid at the rate of eight per cent per annum, interest payable at maturity.

And in case suit is instituted to collect this note, or any portion thereof, the said corporation promises to pay such additional sum as the Court may adjudge reasonable as attorney's fees in such suit.

The maker, sureties, indorsers, and guarantors of this note hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest.

IN TESTIMONY WHEREOF, the Vice-President and the Secretary of said

corporation, under authority of a resolution adopted by its Board of Directors, have hereunto signed the name of the corporation and affixed its corporate seal.

(SEAL) LINCOLN MINE OPERATING COMPANY
By Henry W. Dorman,
Vice-President

ATTEST: Henry O. Dorman,
Secretary

It is also agreed that if the said party of the first part shall fail to make any payment as in said promissory note provided, then at the option of said party of the second part, his executors, administrators or assigns, the said note shall immediately become due and payable and said party of the second part may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds to pay the whole amount in said note specified, and all costs of action or sale, including a reasonable sum as attorney's fees, paying the surplus to the said party of the first part.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed by its Vice-President and its corporate seal to be affixed hereto and these presents attested by its Secretary, the day

and year first above written.

(CORPORATE SEAL)

LINCOLN MINE OPERATING COMPANY
By Henry W. Dorman,
Vice-President

ATTEST: Henry O. Dorman,
Secretary

STATE OF IDAHO, }
COUNTY OF ADA. } ss.

Henry W. Dorman, Vice-President of the Lincoln Mine Operating Company, a corporation, the mortgagor in the foregoing mortgage, deposes and says: That the foregoing mortgage is made in good faith and without any design to hinder, delay or defraud creditor or creditors.

Henry W. Dorman

Subscribed and sworn to before me this 7th day of September, 1927.

(SEAL) L. L. Sullivan
Notary Public for Idaho
Residing at Boise, Idaho

STATE OF IDAHO, }
COUNTY OF ADA. } ss.

On this 7th day of September, in the year 1927, before me, L. L. Sullivan, a Notary Pub-

lic in and for said State, personally appeared Henry W. Dorman, known to me to be the Vice-President of the Lincoln Mine Operating Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year in this certificate above written.

(SEAL) L. L. Sullivan
Notary Public for Idaho
Residing at Boise, Idaho

STATE OF IDAHO, }
COUNTY OF GEM. } ss.

I hereby certify that this instrument was filed for record at request of N. Eugene Brassie at 35 minutes past 10 o'clock A. M., this 10th day of September, 1927, in my office, and duly recorded in Book 2 of C.M.R. as #4560.

Lillian M. Campbell
Ex-Officio Recorder

Fees, $ .50 cts.

STATE OF IDAHO, }
COUNTY OF GEM. } ss.

I, Lillian M. Campbell, Ex-Officio Recorder in and for Gem County, State of Idaho, do hereby certify that the foregoing is a full, true

and corect copy of the original Chattel Mortgage No. 4560, executed by Lincoln Mine Operating Company to William I. Phillips, dated September 1st, 1927, and filed in this office at 10:35 o'clock A. M., the 10th day of September, 1927.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 3rd day of July, 1936.

(SEAL) Lillian M. Campbell
Ex-Officio Recorder
Gem County, Idaho"

EXHIBIT NO. 18.

"This agreement made and entered into this the 6th day of August, A. D. 1929, by and between William I. Phillips of the County of Dade and State of Florida, party of the first part, and Helen S. Pearson, of said County and State, party of the second part;

WITNESSETH: That whereas the Lincoln Mine Operating Company, a corporation organized under the laws of the State of Idaho, did execute and deliver a certain chattel mortgage to the party of the first part on all of its machinery and equipment that it did own at the time of the execution of said chattel mortgage and any machinery and equipment it may become possessed of in the future;

And whereas the said chattel mortgage was de-

livered to the said party of the first party by the said Lincoln Mine Operating Company to secure the said party of the first part for the payment of certain money that the said party of the first part had loaned to the said Lincoln Mine Operating Company;

And whereas the said party of the second part has made certain loans to the said Lincoln Mine Operating Company and the said party of the first part desires to secure the said party of the second part for the payment of all loans made by the said party of the second part to the Lincoln Mine Operating Company and on any loans the said party of the second part may make to the said Lincoln Mine Operating Company in future.

NOW, THEREFORE, In consideration of the sum of One ($1.00) Dollars each to the other in hand paid, and in the further consideration of the sum of Six Thousand One Hundred ($6,100.00) Dollars, which the said party of the second part is about to loan to the said Lincoln Mine Operating Company, the said party of the first party hereby assigns, sets over and transfers unto the said party of the second part, all of his right, title and interest in and to the said chattel mortgage for the purpose of securing the party of the second part for the loan of Six Thousand One Hundred ($6,100.00) Dollars

that the said party of the second part is now making, and all loans that have been made in the past or any loans that may be made in the future by the said party of the second part.

This agreement and assignment is made obligatory upon the heirs, executors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and affixed his seal this the day and year above written.

William I. Phillips (Seal)

Signed, sealed and
delivered in the
presence of us:
Lora M. Wilson
M. E. Howell

STATE OF FLORIDA,
COUNTY OF DADE. } ss.

Personally appeared this day before me, an officer authorized to take acknowledgements, William I. Phillips, who being sworn deposes and says that he executed the foregoing assignment of chattel mortgage for the purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Miami, Dade County, Florida, this the 6th day of August,

A.D., 1929.

Helen M. Haynes
Notary Public
State of Florida at Large

(Seal)

My commission expires: Dec. 13, 1932.

STATE OF IDAHO, }
COUNTY OF GEM. } ss.

I hereby certify that this instrument was filed for record at request of M. W. Hallam at 30 minutes past 11 o'clock A. M., this 20th day of November, 1929, in my office, and duly recorded in Book 2 of Bonds and Agreements, page 426.

Lillian M. Campbell
Ex-Officio Recorder

Fees, $1.20

STATE OF IDAHO, }
COUNTY OF GEM. } ss.

I, Lillian M. Campbell, Ex-Officio Recorder in and for Gem County, Idaho, do hereby certify that the foregoing is a full, true and correct copy of agreement and assignment executed by William I. Phillips to Helen S. Pearson as the same appears on page 426 of Book 2 of Bonds and Agreement Records of Gem County, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal

this 3rd day of July, 1936.

Lillian M. Campbell
Ex-Officio Recorder
Gem County, Idaho"

ASSIGNMENT OF ERROR NO. 4

That the evidence is insufficient to support the judgment in the following particulars:

(a) That there is no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention.

(b) That there is no substantial evidence that the milling and mining machinery could have been used or had a usable value during the period of detention.

ASSIGNMENT OF ERROR NO. 5.

The court erred in refusing to instruct the jury as requested by the defendant in the following written requests for instructions timely presented to the court and denied by it and an exception timely taken to the refusal of the court as to the giving of each of said instructions:

DEFENDANTS' REQUESTED INSTRUCTION NO. 2.

The jury is directed to return a verdict in favor of the defendant, Huron Holding Corporation, a corporation.

DEFENDANTS' REQUESTED INSTRUC-

TION NO. 5.

This action is brought under the statutes of the State of Idaho and is commonly known as a claim and delivery statute, which permits the owner of the property to sue for the recovery of it, and if it is found that he is entitled to return thereof the jury must find the value of the property and assess damages if any are proven by reason of the taking or detention of the said property.

You are instructed that the defendants in this action were not unlawfully detaining or possessing the property until such time as the plaintiff corporation made a demand for the possession thereof and refusal was had upon said demand. You therefore may not find any damages for the detention or for the use of the personal property if you find that it was detained or used in whole or in part for the period of time the property was upon the Lincoln Group of mines prior to the 4th day of June, 1936, and the plaintiff is not entitled to recover in this action for the use of said property if they did so use it prior to the 4th day of June, 1936.

DEFENDANTS' REQUESTED INSTRUCTION NO. 8.

The jury are instructed that the possession of the machinery and equipment and personal prop-

erty involved in this action, insofar as it was in the possession of the defendants prior to June 4, 1936, was a legal possession and the defendants in whose possession said property was were mere bailees without hire and were not responsible for the care of said property, nor was it their obligation to see that it was not removed or stolen or used by any other persons than themselves and they were not responsible to keep or care for said property, except only such items thereof as they actually did use, and you are further instructed in this connection that this is not the proper action in which to determine the value of the use, if any was made by the defendants or either of them of said property or any part thereof prior to June 4, 1936, and you cannot assess damages for detention or use of said property or any part thereof by the defendants or any of them prior to said date.

DEFENDANTS' REQUESTED INSTRUCTION NO. 10.

You are instructed that to permit a recovery of the usable value of property during the time of detention, it must appear not only that the plaintiff had a legal right to use the propetry, but that it was in a position to use it, and intended to use it, and was prevented from such use only by the wrongful detention thereof. There should also be taken into consideration the matter of

whether or not the plaintiff would, or would not, have been able either to use or rent the property continuously during the period of detention. Therefore, if you find in this case that the plaintiff has not shown by a preponderance of the evidence that it would have used the property even if it had not been detained, you should award it no damages for loss of use, other than interest at six per cent on its value. Or, if you find that the plaintiff would have used the property only part of the time, you should award damages based on loss of use only for such time. In case the value of the use is less than interest at six per cent on the value of the property during the entire period of detention, you should award the plaintiff damages in the amount of such interest, but you must not award both interest and the value of the use.

DEFENDANTS' REQUESTED INSTRUCTION NO. 11.

You are instructed that in this case the plaintiff has failed to prove that it would have used the property had it not been detained by the defendant, and having failed so to prove the same, you are instructed that the only amount that you can allow for the detention is interest at the rate of six per cent per annum during said period of detention, said interest to be computed upon the value which you determine said property had.

DEFENDANTS' REQUESTED INSTRUCTION NO. 14A.

You are instructed that testimony was introduced by the plaintiff of the expenditures for mining and development purposes including erection of a mill and placing of equipment on the Lincoln Group of Mines. This testimony was admitted by the court only on the question of whether the defendant, Manufacturers Trust Company, was doing business in the State of Idaho, and you may not consider that evidence at all in arriving at your verdict on the question of damages.

DEFENDANTS' REQUESTED INSTRUCTION NO. 14B.

You are instructed that there is no evidence in this case on the value of the use of the mill and the mill equipment and, therefore, you cannot find in this case any amount for the detention of the mill and the mill equipment.

DEFENDANTS' REQUESTED INSTRUCTION NO. 14C.

You are instructed that before you can consider the rental value of any of the items of property you must find that the property could have been rented and that there was a market for the rental of said property.

DEFENDANTS' REQUESTED INSTRUCTION NO. E.

You are instructed that the defendants were never under any obligation to actually take any of the property of the plaintiff off of the Lincoln Mines Group and deliver it to the plaintiff. They were under legal obligation only to permit the plaintiff to reasonably enter upon the said Lincoln Group of Mines and remove plaintiff's property therefrom. The defendants' refusal to so permit the plaintiff to do began June 4, 1936, and ended October 15, 1937, and the plaintiff since the last mentioned date has had the right of possession and removal of said property, and the defendants' unlawful detention thereof ceased and under the law the possession of the property was returned to the plaintiff by the defendants on said October 15, 1937.

ASSIGNMENT OF ERROR NO. 6.

That the court erred in instructing the jury as follows:

"The reasonable value of the use of such property is to be estimated by the ordinary market price of the use of such property in the vicinity where said property is so situate."

And in also instructing the jury as follows:

"If you find from a preponderance of the evidence that the personal property unlawfully de-

tained by the owner or owners of the Lincoln group of claims has a rental value in the vicinity of Boise, Idaho, where the property is situate, you should return a verdict for the plaintiff for such reasonable market rental thereof."

Which instructions were timely objected to on the grounds that they were inconsistent and not based on any evidence showing that the property could be rented or used during the period of detention.

ASSIGNMENT OF ERROR NO. 7

That the judgment and verdict were contrary to law in that the judgment fails to comply with the applicable provisions of the statutes of the State of Idaho, specifically Section 7-222, Idaho Code Annotated, which is as follows:

"Verdict in claim and delivery.—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such

property."

in that the said judgment and the verdict of the jury on which it was based did not find the value of the property detained by the defendant.

JESS HAWLEY
OSCAR W. WORTHWINE
Residence: Boise, Idaho,
Attorneys for Appellant,
Huron Holding Corporation.

(Service Acknowledged May 27, 1938.)

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Filed May 31, 1938

The defendant, Huron Holding Corporation, having this day filed its petition for appeal from the judgment in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, and having petitioned for an order to be made fixing the amount of security which defendant should give and furnish upon said appeal, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said appeal;

NOW, THEREFORE, IT IS ORDERED that the said defendant, Huron Holding Corporation, on filing with the Clerk of this Court a good and sufficient undertaking in the sum of $10,000.00 to the effect that if the defendant, Huron Holding Corporation, shall prosecute the said appeal to effect and answer all damages, interests and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said undertaking to be approved by this court, that all proceedings in this court be and they are hereby suspended and stayed until the determination of said appeal to the United States Circut Court of Appeals for the Ninth Circuit.

Dated this 31st day of May, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

UNDERTAKING ON APPEAL.

Filed May 31, 1938

KNOW ALL MEN BY THESE PRESENTS: That National Surety Corporation, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and authorized to

transact a surety business in the State of Idaho, is held and firmly bound unto Lincoln Mine Operating Company, a corporation, in the full and just sum of Ten Thousand Dollars ($10,000.00), lawful money of the United States, to be paid to the said Lincoln Mine Operating Company, a corporation, its successors, or assigns, to which payment, well and truly to be made, the said National Surety Corporation, a corporation, binds itself, its successors and assigns, by these presents.

Sealed with our seal, and dated this 31st day of May, 1938.

WHEREAS, lately, at the February, 1938, term of the District Court of the United States, for the District of Idaho, Southern Division, in a suit pending in said court between Lincoln Mine Operating Company, plaintiff, and Manufacturers Trust Company, a corporation, Huron Holding Corporation, a corporation, Alexander Lewis, and Fred Turner, defendants, a judgment was rendered against the said Huron Holding Corporation, a corporation, on March 3, 1938, at the said term of court, and the said Huron Holding Corporation, a corporation, has petitioned for and been allowed, by the Hon. Charles C. Cavanah, Judge of the said District Court, an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a citation has been issued, directed to the said Lincoln Mine Operating Company, a corporation, citing it to appear in the said United States Circuit Court of Appeals for the Ninth Circuit, in the City

of San Francisco, State of California, within thirty days from the date of such citation.

NOW, the condition of the above obligation is such that if the said Huron Holding Corporation, a corporation, shall prosecute its said appeal to effect, and shall answer all damages, interest, and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

NATIONAL SURETY CORPORATION.
By: Geo. C. Walker,
Its attorney-in-fact. (SEAL)

COUNTERSIGNED BY:
Geo. C. Walker,
Its resident agent,
Residing at Boise, Idaho.

APPROVED MAY 31st, 1938:
Charles C. Cavanah,
United States District Judge.

GENERAL POWER OF ATTORNEY

National Surety Corporation

(Attached to Bond.)

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a Corporation, duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N. Y., hath

made, constituted and appointed, and does by these presents make, constitute and appoint F. G. Ensign and Geo. C. Walker, Jointly or Severally, of Boise, and State of Idaho its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, acknowledge and deliver any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; provided, however, that the penal sum of any one such instrument executed hereunder shall not exceed Two Hundred Thousand ($200,000.00) Dollars, and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises. Said appointment is made under and by authority of the following provisions of the By-Laws of the NATIONAL SURETY CORPORATION:

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section 1. The President, Executive Vice President or any Vice President, may, from time to time, appoint Resident Vice Presidents, Resident Assistant Secretaries and Attorneys-in-Fact, to represent and act for and on behalf of the Corporation and the President, Executive Vice President or any Vice President, the Board of Directors, or the Executive and Finance

Committee may at any time suspend or revoke the powers and authority given to any such Resident Vice President, Resident Assistant Secretary or Attorney-in Fact, and also remove any of them from office.

"Section 4. ATTORNEYS-IN-FACT. Attorneys-in-Fact may be given full power and authority, for and in the name and on behalf of the Corporation, to execute, acknowledge and deliver, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings, and any and all notices and documents cancelling or terminating the Corporation's liability thereunder, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the Corporation as if signed by the President and sealed and attested by the Secretary.

"Section 7. ATTORNEYS-IN-FACT. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to copies of the By-Laws of the Corporation or any Article or Section thereof."

IN WITNESS WHEREOF, the NATIONAL SURETY CORPORATION has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 28th day of May, A. D., 1937.

NATIONAL SURETY CORPORATION

By: S. G. Drake, Vice-President.

(SEAL)

ATTEST: A. N. MacDougall,
Assistant Secretary.

STATE OF NEW YORK,)
COUNTY OF NEW YORK.) ss.

On this 28th day of May, A. D. 1937, before me personally came S. G. Drake, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is Vice-President of the NATIONAL SURETY CORPORATION, the Corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order. And said S. G. Drake further said that he is acquainted with A. N. MacDougall and knows him to be an Assistant Secretary of said Corporation; and that he executed the above instrument.

(SEAL)

M. M. MILLER,
Notary Public.

STATE OF NEW YORK,)
COUNTY OF NEW YORK.) ss.

I, A. T. Hunt, Resident Assistant Secretary of the NATIONAL SURETY CORPORATION, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said National Surety Corporation, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of New York, N. Y., this 24 day of May, A. D. 1938.

A. T. HUNT,
Resident Assistant Secretary.

(Title of Court and Cause.)

CITATION ON APPEAL.

Filed May 31, 1938

THE PRESIDENT OF THE UNITED STATES

TO LINCOLN MINE OPERATING COMPANY, a corporation, and to WM. H. LANGROISE and ERLE H. CASTERLIN, its attorneys,

GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to appeal duly allowed and filed in the Clerk's office in the District Court of the United States for the District of Idaho, Southern Division, wherein Huron Holding Corporation, a corporation, is appellant and you are appellee, to show cause if any there be why the judgment against said appellant as in said appeal mentioned should not be corrected and speedy justice should not

be done to the parties in that behalf.

WITNESS the Honorable Charles C. Cavanah, Judge of the said District Court of the United States for the District of Idaho, Southern Division, this 31st day of May, 1938.

CHARLES C. CAVANAH,
United States District Judge.

ATTEST:

W. D. McReynolds, Clerk.
(SEAL)

Service of the above and foregoing Citation by receipt of a copy thereof this 31st day of May, 1938, is hereby admitted.

WM. H. LANGROISE,
ERLE H. CASTERLIN,
Attorneys for Plaintiff.

(Title of Court and Cause.)

PRAECIPE

Filed June 24, 1938

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare, print, authenticate, transmit and return to the U. S. Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in accordance with the Act of Congress approved February 13, 1911 (28 U.S.C. 865-866), and the rules of court adopted thereunder, transcript of the record in the above entitled action on the appeal of the Huron Holding Corporation, a corporation, one of the defendants above named, to said court from the judgment made and entered in said action by the above entitled court on the 3rd day of March, 1938, which said appeal was duly allowed and filed in your office on the 30th day of April, 1938, and include in said transcript the following:

Amended Complaint.

Summons, and return thereon.

Notice of filing and hearing petition of removal.

Petition for removal.

Bond on removal.

Order of removal.

Notice of removal of cause and filing of record in the above entitled court.

Motion to quash service of summons on the Huron Holding Corporation, a corporation.

Order on motion to quash service of summons.

Opinion of court on motion to quash service.

Answer of Huron Holding Corporation.

Verdict.

Judgment.

Bill of exceptions to be hereafter settled and filed.

All orders extending time for settling and filing bill of exceptions.

All orders extending time for return under citation on appeal.

All court minutes and journal entries.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Bond on appeal and approval.

Citation.

Copy of this Praecipe.

Your certificate and return.

Order for transmission of exhibits.

In preparing the above records, you will please omit

the title to all pleadings except the complaint, inserting in lieu thereof the words "title of court and cause" followed by the name of the pleading or instrument, and also omit the verification of all pleadings, inserting in lieu thereof the words "duly verified", and showing in each case fact and date of filing and acceptance of service.

DATED this 24th day of June, 1938.

JESS HAWLEY
OSCAR W. WORTHWINE
Residence: Boise, Idaho.
Attorneys for Defendant, Huron Holding Corporation, a corporation.

(Service Acknowledged June 24, 1938.)

(Title of Court and Cause.)

PLAINTIFF'S PRAECIPE FOR ADDITION TO TRANSCRIPT.

Filed July 6, 1938

To: W. D. McReynolds, Clerk of the above entitled Court:

Please include the following additional portions of

the record in the transcript of the record on appeal:

1. Plaintiff's Amended Complaint.
2. Stipulation dated September 22, 1937.
3. Stipulation dated February 28, 1938.

And prepare, certify, return and transmit the same together with the and in the same manner as the record specified in the Praecipe of the Huron Holding Corporation, a corporation, appellant herein.

W. H. LANGROISE,
SAM S. GRIFFIN,
E. H. CASTERLIN,
Attoneys for Plaintiff.

(Title of Court and Cause.)

CERTIFICATE OF CLERK

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 231, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipes filed herein.

I further certify that the cost of the record herein amounts to the sum of $280.45 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this day of August, 1938.

W. D. McREYNOLDS, Clerk.

(SEAL)

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HURON HOLDING CORPORATION,
a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

JESS HAWLEY,
OSCAR W. WORTHWINE,
Boise, Idaho,
Attorneys for Appellant.

WILLIAM H. LANGROISE,
ERLE H. CASTERLIN,
Boise, Idaho,
Attorneys for Appellee.

.....Clerk.

Filed.....

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IN THE

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FOR THE NINTH CIRCUIT

HURON HOLDING CORPORATION,
a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

JESS HAWLEY,
OSCAR W. WORTHWINE,
Boise, Idaho,
Attorneys for Appellant.

WILLIAM H. LANGROISE,
ERLE H. CASTERLIN,
Boise, Idaho,
Attorneys for Appellee.

.....Clerk.

Filed.....

IN THE

United States Circuit Courtof Appeals

FOR THE NINTH CIRCUIT

HURON HOLDING CORPORATION,
a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

STATEMENT

This is an appeal from a judgment entered for appellee in the United States District Court for the District of Idaho, Southern Division, on March 3, 1938.

The action was commenced in the Seventh Judicial Idaho State District Court, Gem County, against other defendants than the appellant. It was a claim and delivery action under applicable Idaho statutes.

Appellee claimed ownership of a large quantity of mining machinery, equipment and supplies on the Lincoln

group of mines, consisting of five claims, in Gem County, Idaho, belonging to the appellant as beneficial owner. The action sought return of the property or its value and damages for its detention after demand had been made. The action was originally brought against Manufacturers Trust Company, Alexander Lewis and Fred Turner. Alexander Lewis died before the trial (Tr. 183). Fred Turner was an employee without personal liability (Tr. 183) and the action was dismissed as against him. Dismissal was had as to the Manufacturers Trust Company (Tr. 184).

The action was commened in July, 1936, and removed to the Federal Court. The appellant was not made a party for over a year thereafter—and was first brought in by an amended complaint which was filed in the Federal Court on August 17, 1937 (Tr. 22). A copy of summons and complaint and amended complaint was on August 18, 1937, served upon the Auditor of Gem County, Idaho, as the appellant had not complied with the laws of the State of Idaho in the matter of filing its articles of incorporation designating statutory agent. The appellant appeared specially questioning the service by motion to quash (Tr. 40-41), which motion was overruled on September 24, 1937 (Tr. 44). The same objection was unsuccessfully raised by appellant in motion for directed verdict (Tr. 177). The question involved was whether the appellant "was doing business in Idaho" so as to subject it to substituted service upon the County Auditor of Gem County, Idaho.

Appellant employed Turner and another man and had done prospecting work on the mining claims after it acquired possession thereof in July, 1933 (Tr. 68-69). Turner detailed his work which was entirely exploratory and developmental (Tr. 109-150-155, Fozard 161).

Appellee took over a lease of the Lincoln group of lode claims which was made March 25, 1926, between Alexander Lewis, then naked title trustee for Manufacturers Trust Company, and Henry Dorman. Appellee carried on extensive work under the lease as assigned to it by Dorman until October, 1929, at which time it defaulted in performance, abandoned possession and delivered its quitclaim deed to Alexander Lewis (Tr. 65).

The appellee in the course of its operation expended over $300.000.00, but extracted only $25,000 in ore value. It added to the mill and flotation system which was on the property (Tr. 66). Accountant Fox detailed appellee's expenditures (Tr. 70-71-80-83).

When it surrendered possession and ceased operation of the Lincoln group of mines in October, 1929, appellee left the personal property it had installed and made no effort to repossess it—in fact paid no taxes—employed no watchman—paid no insurance, and practically abandoned whatever it had placed on the mine (Tr. 66-160). It was subject to a mortgage of $45,000, drawing interest at 8% annually, which more than covered the value of the property.

November 21, 1931, Mr. Lewis, acting for the bene-

ficial owner, Manufacturers Trust Company, leased and optioned the Lincoln group to Wm. I. Phillips, who was the President and the majority stock owner of the appellee corporation. He organized a new corporation under the Idaho laws—the Ojus Mining Company—and after assigning his lease and option to it (Tr. 66-67) that company operated and took out about $7,000.00 in ore value, but failing to perform under the terms of its lease and option surrendered possession of the group of claims in April, 1933. During its operation, the personal property which the appellee had left on the group of claims in 1929 was used by the Ojus Company—whether with appellee's consent not being disclosed (Tr. 67).

When the Ojus Company turned back the mine to Mr. Lewis an inventory called the Harvey Inventory was made by appellant and it included all personal property then on the group, whether owned by Lewis, Ojus, or Appellee (Tr. 58-59-111).

Its property remained on the mine without removal or any attempt to exert any possessory right concerning it; Appellant's possession resting on the fact that the property was on its mining claim, was a lawful possession (Tr. 66-110-111) until June 4, 1936, when the president of the appellee, with its attorney, went to the mine and without specification or identification, demanded from Turner the personal property which they said belonged to the appellee (Tr. 61). This demand was refused and appellee commened the claim and delivery action on June 29, 1936.

The appellee attached as Exhibit "A" to its amended complaint a list of the personal property claimed by it. (Tr. 25-36). This consisted of kitchen utensils, stoves, beds, and other minor items, and also large and important mining machinery, motors, and equipment. In addition it describes a Marcy Ball Mill which the appellee had placed upon the property. It also includes a large number of smaller items used in connection with mining operations and office equipment.

During the course of the trial the appellee introduced as its exhibit No. 12, its own specially prepared inventory of property claimed. During the course of the trial it eliminated by red ink lines a number of items. It asked permission to amend its complaint by substituting Exhibit No. 12 for Exhibit "A" which was attached to the complaint. The court refused to admit the amendment (Tr. 152-154).

Appellee's expert witnesses, Parsons and Arnold, testified as to the value of the various articles described in Exhibit No. 12 and as to the rental value thereof. There being no market at the mine the court permitted testimony to be given as to values at Boise, Idaho.

There was no evidence that the property, and particularly the Marcy Ball Mill, could actually have been sold or rented during the period covered either at Boise or at the mine.

Appellant offered testimony in connection with the question of value as reflecting rental prices that the ap-

pellee company had in 1927 given a chattel mortgage to William I. Phillips upon the Marcy Ball Mill and certain mill equipment and motors and other items therein described to secure the payment of a $45,000.00 principal note to Phillips, which with interest due totalled over $75,000 (Exhibit 17) (Tr. 200-206).

It also offered Exhibit No. 18, a transfer of that mortgage to Helen S. Pearson (Tr. 206-210). The court refused to admit either exhibit.

This evidence was important because under the statutes of Idaho, the property could not be removed from Gem County, Idaho, or sold or disposed of without the written consent of the mortgagee and it, therefore, could not have been sold or rented in Ada County, where the market prices on which the expert witnesses testified as to sale and rental values were established. It was a crime, larceny, to remove, sell or dispose of that property without the consent of the mortgagee. The appellee, having no use itself for the property and therefore wishing to sell or lease or remove it from the Lincoln group of mines and into some other county, it was perforce required to secure the consent of the mortgagee, otherwise it could not rent or sell the property, or any part thereof. It had then as a practical matter no rental or sale value to appellee during the period of detention unless its mortgagee consented.

The case was tried before a jury and all of the party defendants were dismissed excepting only the appellant, and judgment was rendered against it for the sum of $6,730.70.

The claim and delivery statutes of Idaho make special provision for a judgment fixing the value of the property in order that if it were not returned the judgment against the appellant should be for the value of that property in addition to any damages sustained by reason of its unlawful detention.

The verdict was merely for damages. The judgment followed the verdict and did not fix the value of the property and provide for a money judgment if it were not returned as the statute provided. (Tr. 56-57).

Appellant, by its answer (Tr. 45-48) set forth the defense that it was not within the jurisdiction of the court because not served personally, and that the service which was had on the Auditor of Gem County, Idaho, was not legal service, also abandonment of both title and possession, and finally pleaded the bar of the statute of limitation. In the trial, however, it was stipulated and agreed that the appellant abandoned all claim to the property but had detained it from June 4, 1936, until October, 1937, at which time it had withdrawn its denial of the rights of the appellee, and its own claims to the property as made in the pleadings (Tr. 60).

POINTS AND AUTHORITIES

I.

APPELLANT WAS NOT DOING BUSINESS IN IDAHO AND THEREFORE SUBSTITUTED SERVICE MADE UPON IT WAS ILLEGAL.

This point covers Assignments of Error No. 1 and No. 2.

"ASSIGNMENT OF ERROR NO. 1

"The court erred in denying the motion of the defendant to quash service of summons and dismiss the action on the ground that the said defendant had not been served with summons or complaint in any lawful manner." (tr. 198-199)

"ASSIGNMENT OF ERROR NO. 2

"The court erred in denying the said defendant's motion for a directed verdict in its favor on the ground that it had not been properly served with summons and complaint in accordance with the laws of the State of Idaho and was not within the jurisdiction of this Court and was not doing business in the State of Idaho at the time of the attempted service upon it." (Tr. 199)

Boise Flying Service, Inc. vs. General Motors Acceptance Corporation, 55 Idaho 5, 36 Pac. (2d) 813.

Burlington Savings Bank v. Grayson, 43 Idaho 654, 254 Pac. 215.

Portland Cattle Loan Company vs. Hansen Livestock & Feeding Company, 43 Idaho 343, 251 Pac. 1051.

II.

BECAUSE THE VALUE OF APPELLEE'S PROPERTY WAS A VITAL ISSUE THE COURT ERRED IMPORTANTLY IN REFUSING EVIDENCE TO SHOW CAUSE THAT IT COULD NOT BE REMOVED FROM GEM COUNTY, NOR SOLD OR DISPOSED OF WITHOUT CONSENT OF THE MORTGAGEE.

This point covers Assignments of Error No. 3, a part

of No. 4, subparagraph (a), a part of No. 5, being Defendants' Requested Instructions Nos. 14B and 14C, and Assignment of Error No. 6.

ASSIGNMENT OF ERROR NO. 3 is not copied here for the reason that it contains copies of Exhibits No. 17 and No. 18, and is too long for exact quotation. This assignment epitomizes the offer to introduce exhibits No. 17 and 18, being the chattel mortgage from appellee to Wm. I. Phillips and the assignment by him to Helen S. Pearson (Tr. 199-210).

"ASSIGNMENT OF ERROR NO. 4:

> "That the evidence is insufficient to support the judgment in the following particulars:
> "(a) That there is no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention." (Tr. 210).

"ASSIGNMENT OF ERROR NO. 5, (in part):
"DEFENDANTS' REQUESTED INSTRUCTION NO. 14B;

> "You are instructed that there is no evidence in this case on the value of the use of the mill and the mill equipment and, therefore, you cannot find in this case any amount for the detention of the mill and the mill equipment." (Tr. 214).

"DEFENDANT'S REQUESTED INSTRUCTION NO. 14C:

> "You are instructed that before you can consider

the rental value of any of the items of property you must find that the property could have been rented and that there was a market for the rental of said property." (Tr. 214-215).

"ASSIGNMENT OF ERROR NO. 6

"That the court erred in instructing the jury as follows:

"That reasonable value of the use of such property is to be estimated by the ordinary market price of the use of such property in the vicinity where said property is so situate.

And in also instructing the jury as follows:

"If you find from a preponderance of the evidence that the personal property unlawfully detained by the owner or owners of the Lincoln group of claims has a rental value in the vicinity of Boise, Idaho, where the property is situate, you should return a verdict for the plaintiff for such reasonable market rental thereof."

Which instructions were timely objected to on the grounds that they were inconsistent and not based on any evidence showing that the property could be rented or used during the period of detention." (Tr. 216-217)

Section 44-1007, Idaho Code Annotated.

Young v. Boise Payette Lumber Co., 45 Idaho 671, 264 Pac. 873.

Section 17-3907, Idaho Code Annotated.

State v. Olsen, 53 Idaho 546, 26 Pac. (2d) 127, at p. 128.

III.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE MILLING AND MINING MACHINERY COULD HAVE BEEN RENTED OR USED DURING THE PERIOD OF UNLAWFUL DETENTION.

This point covers Assignment of Error No. 4, and part of Assignment of Error No. 5, to-wit: Defendants' Requested Instructions Nos. 14B and 14C. (Tr. 210-214).

"ASSIGNMENT OF ERROR NO. 4:

> "That the evidence is insufficient to support the judgment in the following particulars:
>
> (a) That there is no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention.
>
> (b) That there is no substantial evidence that the milling and mining machinery could have been used or had a usable value during the period of detention." (Tr. 210)

ASSIGNMENT OF ERROR NO. 5, (in part):

Appearing in full under Point II.

8 R. C. L., pp. 487-489, sec. 48.
23 R. C. L., p. 912, sec. 75.
Osier vs. Consumers Water Co., 41 Idaho 268; 239 Pac. 735.
McMaster v. Warner 44 Idaho 544; 258 Pac. 547,
Vaughn v. Robertson & Thomas 54 Idaho 138; 29 P. (2d) 756.
Hargis v. Paulson, 30 Ida. 571; 166 Pac. 264,
Holt v. Spokane Ry. Co., 4 Ida. 443; 40 Pac. 56.
Antler v. Cox, 27 Ida. 517; 149 Pac. 731,

IV.

THE COURT DID NOT INSTRUCT THE JURY IN SEVERAL PARTICULARS AS REQUESTED BY THE APPELLANT, AND AS THE NATURE OF THE CASE DEMANDED.

This point covers Assignment of Error No. 5.

"ASSIGNMENT OF ERROR NO. 5. We do not set forth the requested instructions in full because of their length, but those we think of importance enough to warrant this court's attention are:

Defendants' Requested Instruction No. 14B (Tr. 214) (See point II.)

Defendants' Requested Instruction No. 14C (Tr. 214) (See point II.)

Defendants' Requested Instruction No. 10 (Tr. 212-213)

23 R. C. L., Sec. 75, p. 912.

54 C. J., para. 359, p. 612.

54 C. J., para. 364, p. 614.

DEFENDANTS' REQUESTED INSTRUCTION NO. 11:

"You are instructed that in this case the plaintiff has failed to prove that it would have used the property had it not been detained by the defendant, and having failed so to prove the same, you are instructed that the only amount that you can allow for the detention is interest at the rate of six per cent per annum during said period of detention, said interest to be computed upon the value which you determine said property had." (Tr. 213)

DEFENDANTS' REQUESTED INSTRUCTION NO. E;

"You are instructed that the defendants were never under any obligation to actually take any of the property of the plaintiff off of the Lincoln Mines Group and deliver it to the plaintiff. They were under legal obligation only to permit the plaintiff to reasonably enter upon said Lincoln Group of Mines and remove plaintiff's property therefrom. The defendants' refusal to so permit the plaintiff to do began June 4, 1936, and ended October 15, 1937, and the plaintiff since the last mentioned date has had the right of possession and removal of said property, and the defendants' unlawful detention thereof ceased and under the law the possession of the property was returned to the plaintiff by the defendants on said October 15, 1937." (Tr. 215)

Blackfoot City Bank vs. Clements 39 Idaho 194, 226 Pac. 1079.

54 C. J., para. 376, p. 623.

23 R. C. L. sec. 73, p. 911.

Vance vs. W. A. Vandercook Co., 170 U. S. 468, 42 L. Ed. 1111.

V.

THE VERDICT AND JUDGMENT WAS NOT IN ACCORDANCE WITH THE REQUIREMENTS OF THE IDAHO CLAIM AND DELIVERY STATUTES.

This covers Assignment No. 7:

"ASSIGNMENT OF ERROR NO. 7:

"That the judgment and verdict was contrary to law in

that the judgment fails to comply with the applicable provisions of the statutes of the State of Idaho, specifically Section 7-222, Idaho Code Annotated, which is as follows:

> "Verdict in claim and delivery. —In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property."

in that the said judgment and the verdict of the jury on which it was based did not find the value of the property detained by the defendant." (Tr. 216-217).

Section 7-222, Idaho Code Annotated.

CONCLUSION

ARGUMENT

I.

APPELLANT WAS NOT DOING BUSINESS IN IDAHO AND THEREFORE SUBSTITUTED SERVICE MADE UPON IT WAS ILLEGAL.

This point covers Assignments of Error No. 1 and No. 2.

Appellant did not make filings required by Idaho statutes of a foreign corporation doing business therein. It contended it was not "doing business" in the State of Idaho.

Service was had upon the County Auditor of Gem County on the theory that the appellant was doing business and had no statutory agent upon whom service could be made and, therefore, under the law, the Auditor being made the agent for service for such a corporation the appellant was lawfully served.

In Idaho there is no precise test of the nature or extent of business that must be done in order to constitute "doing business" —the answer depends upon the circumstances of each case.

> Boise Flying Service. Inc. vs. General Motors Acceptance Corporation, 55 Idaho 5, 36 Pac. (2d) 813.

The Lincoln group of mines was originally acquired in the nature of security by the Manufacturers Trust Company. (Tr. 60-67) and title was taken in the name of an employee, Alexander Lewis. In 1933 the beneficial interest of Manufacturers Trust Company was transferred to the appellant. For a short time it employed about twenty-five men in exploration work and has continued with the service of two men during the entire period since. It has not done any mining in the sense of extracting ores, but it has driven tunnels and carried on exploration work and has also protected its property through the service of

a watchman. The appellant owns no other property in the State of Idaho.

In order that mining property be of any value some discoveries must be made, development and prospecting is necessary. This work is incidental to the ownership of the property and as an isolated transaction we contend it does not constitute the doing of business.

We realize that the appellant has expended money and has done work, but in view of the character of the property and the fact that the appellant is not a mining corporation but merely a holding or salvaging corporation, we have made the point that it does not come within prohibitions of the statutes and is not doing business.

Burlington Savings Bank v. Grayson, 43 Idaho 654, 254 Pac. 215. In this Idaho case a bank which carried on a number of loan transactions in Idaho and in connection therewith examined land covered by the mortgage was permitted to sue in the State of Idaho though it had not complied with the foreign corporation laws.

Portland Cattle Loan Company vs. Hansen Livestock & Feeding Company, 43 Idaho 343, 251 Pac. 1051. In this case the corporation carried on many loan transactions which were part of its regular business, and yet it was held not to be doing business in the state.

The transfer to the appellant of the Lincoln group of mines from Manufacturers Trust Company was consummated in New York and not in the State of Idaho.

II.

BECAUSE THE VALUE OF APPELLEE'S PROPERTY WAS A VITAL ISSUE THE COURT ERRED IMPORTANTLY IN REFUSING EVIDENCE TO SHOW CAUSE THAT IT COULD NOT BE REMOVED FROM GEM COUNTY, NOR SOLD OR DISPOSED OF WITHOUT CONSENT OF THE MORTGAGEE.

The Appellee's main concern in the trial was the establishment of damages for unlawful detention of its property. It relied upon two expert witnesses, Mr. Parsons and Mr. Arnold, to prove that the property did have a rental value based on percentages of its market value (Tr. 113, et seq., 146, et seq.)

All of the property concerned was located on the Lincoln Mine, which in turn is located in Gem County, Idaho.

The period of detention was clearly established as beginning June 4, 1936, and ending October 15, 1937 (Tr. 58-60-68-70-117-118-136-177-179-215). Whether during that time this property could have been rented and at what rental prices were therefore the vital elements to be proven by the appellee.

As a condition precedent to the rental of the property common sense requires that the appellee must definitely show that during the period involved it had undoubted right to remove it from the mine and permit it to be sold or rented. If it could not be so removed it could neither

be sold or rented and therefore the appellee could not be deprived of any rental income from it.

Appellant attempted to introduce Exhibits No. 17 and 18 (Tr. 112) —a mortgage and assignment thereof. The court sustained appellee's objection on the ground "* * * the issue here seems to be the possession." (Tr. 112).

In this the court was in error for the question of possession was not at all an issue since at the opening of the case, it definitely appeared that any rights it had to the property were withdrawn on October 15, 1937. The court, pertinently however, suggested that the exhibits might be admissible on the question of value because of the question as to the right of the appellee to remove the property. The appellant accepted the ruling at that stage of the procedure since there had been no evidence introduced to then on the rental or use value, and the exhibits were definitely tied to that phase of the case.

Later the exhibits were offered and a general objection made by the appellee sustained and exception allowed.

Exhibit No. 17 exactly copied in this record is a mortgage dated September 1, 1927, given by the appellee to William I. Phillips. Exhibit No. 18, likewise exactly in the record, is an assignment of that mortgage by Phillips to Helen S. Pearson (Tr. 166-176).

An examination of these exhibits show that Exhibit No. 17 is a certified copy of chattel mortgage in due and legal form properly filed in Gem County and generally covering all the appellee's personal property on the Lin-

coln group, specifically designating many important items such as the Marcy Ball Mill which the appellee had installed—this was described in the exhibit to the amended complaint (Tr. 29) and in exhibit No. 12 (Tr. 94), and often referred to in the testimony (Tr. 120-121-134-144-145-155-156-161-164). Its value was placed at $3,800.00 (Tr. 121).

The Fahrenwald Classifier described in the mortgage was also contained in Exhibit 'A' attached to the amended complaint (Tr. 29), and under mill machinery in Exhibit No. 12 (Tr. 94).

The filter likewise was referred to in said Exhibit 'A' (Tr. 29) and in Exhibit No. 12 (Tr. 94); its value was fixed at $1,800.00 by Mr. Parsons (Tr. 121).

The motors mortgaged are also found in the complaint's Exhibit 'A' (Tr. 29) and Exhibit No. 12 (Tr. 99-100), and the motor values were by witness Parsons valued at various prices (Tr. 122-123) aggregating several thousand dollars.

The other property embraced in the general description "* * * any and all other personal property* * *" (Tr. 168) is contained in both the complaint exhibit and exhibit No. 12 by general reference, although not specifically described.

It thus appears that a large percentage of the value claimed by the appellee for its property consisted of the mortgaged property. It was such an important part of appellee's property that the testimony would not support any

considerable verdict, even though a segregation were possible and had been made, if the mortgaged property were excluded from consideration.

At this point we suggest that the appellee's president admitted that after his company had abandoned the Lincoln group in 1929 it did not remove any machinery; also that the plaintiff had no other property in Idaho and of course could not make any use of the machinery in its own operations, he failed to state that there was either plan, intent or possibility of appellee's selling or renting any of the property. (Tr. 159-160).

Exhibit No. 18 shows a valid transfer of the mortgage from Phillips to Helen S. Pearson.

When mortgaged personal property is removed from any county where the mortgage is filed for record the validity and effect of the mortgage as against all persons is not affected thereby unless such property be removed by the written consent of the mortgagee, and it would pass to a buyer or lessee subject to the mortgage lien. Section 44-1007, Idaho Code Annotated.

This has been interpreted as requiring nothing less than written consent from the mortgagee to permit removal of property.

> Young vs. Boise Payette Lumber Company, 45 Idaho 671, 264 Pac. 873.

There is another statute of even greater importance—Section 17-3907, Idaho Code Annotated, which provides:

> "Every mortgagor of property mortgaged in pursuance of the provisions of chapter..... of title....., Idaho Code, who, while such mortgage remains unsatisfied in whole or in part, willfully removes from the county or counties where such mortgage is recorded, or destroys, conceals, sells, or in any manner disposes of the property mortgaged, or any part thereof, without the consent of the holder of the mortgage, is guilty of larcency."
> Section 17-3907, I. C. A.

In the case of State v. Olsen, 53 Idaho 546, 26 Pac. (2d) 127, the crime created by this statute was discussed and the court said:

> "We deem it proper, because of the unusual and extraordinary situation shown by the record in the instant case, to say that, in our judgment, the essential elements of the crime defined by section 17-3907, I. C. A., are: The willful removal of mortgaged personal property from the county or counties, where the mortgage is recorded, while the mortgage remains unsatisfied in whole or in part, coupled with the willful destruction, concealment, sale or disposal of the mortgaged property, or any part thereof, without the consent of the holder of the chattel mortgage."

Had these exhibits been introduced in evidence the jury perforce could have found no verdict for rental use or value since not a single item of the property could be removed, sold, or rented without the written consent of the mortgagee, Helen S. Pearson. Had such consent existed undoubtedly it would have been known to the appellee's president, Mr. Phillips, who was present during the trial. The relevancy of the exhibits was clearly indicated and no objection would have been made by the appellee

had consent ever been given as required by the statute, since if that consent were given, of course the point made that the Idaho statute prevented removal, or sale, or rental of the property would have been definitely answered.

Undoubtedly it had no such consent from mortgagee Pearson—in this connection it is worthy of comment that the appellee never made the slightest attempt to remove or sell the property during the eight years elapsing from the creation of the mortgage until the very date of trial. At no time did the appellee show any concern over the property excepting on June 4, 1936, when it demanded possession. It did not pay taxes, employ a watchman, or do any of those things that would have been done had the appellee believed the property to be of value to it above the lien of the mortgage.

It did not show that it ever had a customer to either buy or rent and there is an absolute lack of any definite or specific loss of income from rental.

Assignment of error No. 3 (Tr. 199-210) specifically covers the refusal of the court to admit these exhibits.

Assignment of Error No. 4, subparagraph (a) (Tr. 210) is the appellant's point that there was no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention.

Assignment of Error No. 5 covers this point in the court's refusal to give defendants' requested instructions No. 14B and 14C (Tr. 214). Instruction 14B in effect

was that there was no evidence on the value of the important use of the mill and equipment items. This error will be argued on other phases in a different portion of this brief, but at this point we suggest that there was no evidence on the value of the use of the mill and the mill equipment in either Gem County, or, as we understand it, in any other county.

Defendants' requested instruction No. 14C very definitely required the jury to find "* * * the property could have been rented and that there was a market for the rental of said property." Under our view the property could not have been rented.

Assignment of Error No. 6 (Tr. 215-216) is our charge of error in the court instructing the jury as to the values in the vinicity of Boise, Idaho. There was no evidence that this property could have been removed to the market covered by that description. Indeed it could not be removed from Gem County. This instruction erroneously implied there was no obstacle to the appellee's removal of the property or its sale or rental outside of Gem County.

The refusal of the lower court to admit Exhibits 17 and 18 allowed the jury to believe that the appellee could have sold or rented the property in the Boise market. The record shows no actual demand existing during the detention period for sale or rental even in the Boise market—certainly none in Gem County.

Had these Exhibits been admitted they would have

shown an unsurmountable obstacle to removal, rental or sale and no verdict could have been rendered beyond possibly six per cent interest as general damages.

III.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE MILLING AND MINING MACHINERY COULD HAVE BEEN RENTED OR USED DURING THE PERIOD OF UNLAWFUL DETENTION.

The point here is that the evidence does not show that there was a market for the rental of the property as a whole and particularly for the important item of mill and mill machinery. We have argued in the previous point that the property could not be removed from Gem County under the mortgage to Phillips which he assigned to Helen S. Pearson and, also could not have been sold or disposed of even in Gem County. Therefore, any evidence of what that property would have brought in any other county was not relevant or material until the appellee showed that it had the mortgagee's consent as required by Idaho laws to remove it.

We now suggest that the testimony itself be examined to determine its sufficiency under any circumstances.

No testimony was offered by Mr. Phillips as President of the Appellee about possibilities of renting or selling the property and we emphasize that had there been any he would have known it and pointed out how the appellee

was actually deprived of rental income or sale. Neither did he in any way account for the failure to remove the property, sell it, or rent it from the time, to-wit: October 15, 1937, when the resistance of the appellant to possession was removed, until the time of the trial, February 1938.

May we not fairly conclude that the appellee had no damage done to it from actual loss of sale or rental?

That all of the property was on the mining claims at the time of the trial is evidenced by the fact that the appellee's expert on values, Mr. Parsons, examined the property, though only in a hasty way, a few days before the trial (Tr. 116).

As a basis for controverting substantial damage as reflected in the verdict we find the utter indifference so suggestive of abandonment that appellant made that a ground of defense in its answer—the Appellee and its President, Mr. Phillips, never explained why during the years elapsing from October, 1929, to June, 1936, no attempt was made to either sell or remove the property, and why if it had a rental value no attempt was made to rent it. Surely, the appellee was under some type of logical duty to explain how that rental value existed in the few months of detention yet never existed in over six years prior to the demand nor from Oct. 15, 1936 to the time of trial. It is hardly logical or sensible to assume that the appellee would forego the great income which its expert established was to be had as a rental value.

Mr. Parsons, who alone testified on the subject, said

that the total value of the property was $16,949.16 (Tr. 138), and that there was no difference between the value as of the date of the demand, June 4th, 1936, and the time that the appellant withdrew objection to the repossession of the property October 1937 (Tr. 135).

During that period of one year and four months Mr. Parsons stated that the fair rental value was the sum of $18,460.96 (Tr. 138)—*more than the property itself was worth at any time during the detention.* Surely, if that comparatively enormous rental was lost during that period of time what a great loss was incurred by the appellee during the seven years preceding, and the several months in 1936 and 1937 when appellant withdrew its opposition to removal.

Basicly,therefore, the appellee is making a claim without what would seem to be a necessary explanation of its failure to realize something proportionate to this figure during the time suggested. This situation, it seems to us, logically throws a doubt upon the substantial accuracy of any rental or use claimed during detention.

We examine the testimony of Mr. Parsons and find that he spent between 2½ and 3 hours a few days before the trial examining the property (Tr. 116) and that is the sum and substance of his actual knowledge of it. The ridiculousness of claiming that this type of examination was sufficient or was anything more than an off-hand guess appears too from the witness' statement that were he going to himself purchase the property he would give more time to its examination (Tr. 145).

He was asked many times the rental market value. He relied upon machinery reports of manufacturers for most of his important machinery pricing (Tr. 127).

The mill value was based upon the owner's price on an Oregon mill, over four hundred miles away, and a mill at Atlanta which his own company had bought (Tr. 128). One gets the idea from his testimony that he is fixing values at what he thought he could get as a seller of the property if he had it in his Boise yard, not on market value. (Tr. 129). He did say that he would sell the property at the Lincoln mine to a mythical buyer who, of course, would remove it from its base and to a place of use (Tr. 131, 132, 133).

The importance of valuation lies in the fact that it forms the basis of rental estimates made by him which were percentages of the values. In this he admitted that where property was rented for a long period it was usually coupled with an option to purchase and the rentals would go upon the purchase price (Tr. 140-141). He was somewhat evasive later in his examination on this subject, but finally came to the admission that his rental value was not a set market value, but depended upon individual agreement (Tr. 144). He likewise admitted there was no general custom or rule about rentals and the parties usually made an independent agreement (Tr. 143-144).

If this property were rented only for two or three months his testimony might be relevant, but where a period of one year and four months is concerned, certain-

ly not, for if anyone would rent the property for that period of time, he would own it under the custom of allowing rental to go on the purchase price. If the appellant were to be charged a rental of $18,460.96, then under the practices stated by Parsons it would own it, for the entire value was only $16,949.16. Mr. Parsons claimed that such an amount was a "fair rental value" notwithstanding it would eat up the entire value of the property (Tr. 138).

A perusal of his whole testimony must lead an impartial observer to conclude that for the situation here, to-wit: a long rental—the percentages he applied were not fair or customary *and there is no evidence of what a fair rental value would be for the entire detention period.* (Tr. 139-140).

The minor valuation expert, Mr. Arnold, based his rental value upon what his individual company charges and he could not name a single article rented by that company during the period here involved (Tr. 147-148).

Now there is no other testimony on this question of rental value introduced by the appellee; they presented but the two witnesses, and we believe they did not give the jury a fair basis or a definite one on which to base a use value verdict in the amount found of $6,730.70.

When one analyzes the testimony it is absolutely impossible to tell how that amount was found. It must have been by guess and conjecture for if the jury had followed the testimony of Mr. Parsons, to a small degree substan-

tiated by Mr. Arnold, it would have found a much larger value. He left no alternative of a definite character, and the jury must have disbelieved the only testimony on the question of value and substituted its surmise without fair basis in the testimony.

It is true that Mr. Hopper, witness for the appellant, testified as to the value of motors but this took in only a small amount of the property. (Tr. 157).

No one can object that a jury compromise between conflicting testimony, but here there was no conflict in the major items outside of motors, and therefore there could have been no compromise based on testimony. It logically follows that the jury rejected Parsons' testimony and if it did that where could it have found any evidence on which to base the amount that it found? It must have assumed that the property would have been rented on special agreement since it overran the three or four months which Parsons testified was the basis for his percentages, and assumed a bargain between a seller and a buyer, and further assumed what that bargain would cover as fair rental bases. There is no evidence that special agreements were made or could have been made or what terms were customary.

The failure of the testimony becomes more noticeable when one considers the value placed by Parsons on the Mill of $3,800.00 (Tr. 121); he admitted he did not know its condition (Tr. 144-146), further that he did not know of any mill that size that had been rented—he admitted

further that he had had no rental experience with mills in Boise or vicinity, and that he based his rental value estimate on what the mill would likely rent for "on a future estimate, a possibility" (Tr. 133-135). Arnold knew of none (Tr. 148).

We do not forget the Idaho rule which protects a judgment where the evidence conflicts, but as we see this case the vital need of the appellee in order to meet its burden of proof was to establish that the property could have been rented or sold and this it did not do beyond the possibility of surmise and conjecture to that effect which may arise from appellee's expert witnesses. Surely that is offset by the failure to prove that the property could have been rented or sold by positive clear testimony to that effect and particularly by the failure of the appellee through its President, Mr. Phillips, or any other officer to so prove.

> " * * * for the rule has been repeatedly announced in this state that every party to a law action has a right to insist upon a verdict or finding based upon the law and the evidence in the case and not, in the absence of evidence, upon mere inference or conjecture."
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> McMaster v. Warner, 44 Idaho 544; 258 Pac. 547.
>
> Affirmed in Vaughn vs. Robertson & Thomas, 54 Idaho. 138, 29 Pac. (2d) 756.
>
> Hargis v. Paulson, 30 Idaho 571, 166 Pac. 264.
>
> Antler v. Cox, 27 Idaho 517, 149 Pac. 731.
>
> Holt v. Spokane etc. Ry Co., 4 Idaho 443, 40 Pac. 56.

Osier v. Consumers Water Co., 41 Idaho 268, 239 Pac. 735.

The appellant did not use the mill or any substantial portion of appellee's property. (Tr. 150-151-155). Therefore the appellant did not actually injure the property or get any benefit from it, and in fact benefited the appellee by keeping the property and watching it. Its value was the same in October 1937 as in June 1936. (Tr.138).

There is nothing in the testimony to definitely show that any substantial part of this property, excepting possibly the motors, could have been rented. It is true that the witnesses Parsons and Arnold testified to market rental value, but that is not sufficient for their testimony was of a theoretical nature and based on what the property should have rented for if there had been a demand for it. They did not establish a demand. It seems to us extremely important to the appellant's case that it show that not only was there a market price for property rental but also it could have been rented, that there was an actual demand for it. The mere fact that if it were rented it should bring a certain rental value does not complete the picture, for in order to get any money out of the use of the property there must be someone willing to rent it.

As we have before suggested the evidence actually shows no rental demand for the mill, but further than this the question of whether the property could have been rented is left unanswered. It is not shown that appellant prevented the rental—rather is it indicated that there was no lessee in sight.

"Ordinarily the measure of damages for the loss or destruction of property is its market value, if it has a market value, and in such case no recovery can be had on the basis of its value to the owner individually, apart from its value. *In order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity;* that is, a demand therefor, and an ability from such demand to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing, and no ability to sell the same, then it cannot be said to have a market value. If the market value would not be a fair compensation to the plaintiff for his loss, he is sometimes permitted to recover the value to him based on his actual money loss. The fact that property has no market value does not restrict the recovery to nominal damages only, but its value or the plaintiff's damages must be ascertained in some other rational way, and from such elements as are attainable. In such case, the proper measure of damages is generally its actual value, or, as is sometimes said, its value to the owner, taking into account its cost and such other considerations as may affect its value in the particular case. Though the cost may be considered, this alone is not always the correct criterion for determining the present value * * * ". (Italics ours).

8 R. C. L. pp. 487-489, sec. 48.

23, R. C. L., sec. 75, in part, is as follows:

"To permit a recovery of the usable value during the time of detention it must appear not only that the successful party had a legal right to use the property but that he was in a position to use it and was prevented from such use only by the wrongful detention thereof."

IV.

THE COURT DID NOT INSTRUCT THE JURY IN SEVERAL PARTICULARS AS REQUESTED BY THE APPELLANT, AND AS THE NATURE OF THE CASE DEMANDED.

This point covers Assignment of Error No. 5 (Tr. 210-215). Part of this assignment is Defendants' Requested Instruction No. 10, which in effect requires establishment of ability of the appellee to use the property and provides damages on an interest basis if the appellee could not have used it (Tr. 212).

If the lower court took the view that this instruction precluded the appellee from damages unless it *personally used* the property and that value is claimed, then we think we are not entitled to the instruction, but we think the word "used" indicated a use not in the sense that the appellee must personally run the mill, use the transformers, etc., but in the larger sense it includes an opportunity to rent the property. We think the jury should have had before it the possibility of the appellee renting the property and using it in the sense of securing income by rental, and if this could not be done damages should be confined to interest.

We have probably reiterated this point too often in our brief, but after all, it is the main point in our attack—the appellee was not damaged actually by the detention of the property because it could not have actually used it or rented it. A good general expression of that rule is found in 23 R. C. L., Section 75, p. 912:

> "* * * To permit a recovery of the usable value during the time of detention it must appear not only that the successful party had a legal right to use the property, but that he was in a position to use it and was prevented from such use only by the wrongful detention thereof. * * *"

We also take the view that the purpose of a judgment in claim and delivery is not punitive but compensatory, and in this again the general rule is stated in 54 C. J., para. 359, p. 612:

> "* * * Damages to the successful party in a replevin suit are ordinarily to compensate him for the loss he has sustained by being wrongfully deprived of the possession of his property * * *".

Defendants' Requested Instruction No. 11. (Tr. 213). Here again the accuracy of the court's ruling depends upon whether the word *use* should be restricted to the appellee's personal *use,* or include use for rental as has just above been suggested.

Defendants' Requested Instruction No. 14B. (Tr. 214)

We think the court clearly erred in failing to give this instruction because there was no evidence of value of the use of the mill or mill equipment. We have previously referred to the testimony of Parsons and Arnold, and they are the only ones who testified on this subject, and it is shown by the evidence that they did not know what the rental value of the mill was. If that was true we are entitled to an instruction which would take from the jury the consideration of its rental value.

Defendants' Requested Instruction No. 14C. (Tr. 214)

We have argued that unless the property could have been rented and there was a market for its rental then the appellee should not recover something that is merely a figment of imagination. Suppose that the appellee had not been refused possession of the property? Is there any evidence here to show that it could have been rented? —surely one can't assume that from the mere fact of detention arises an obligation to pay rental where there was neither market or demand.

There is respectable authority to the effect that where the plaintiff in a replevin suit does not prove any actual damages he is entitled nevertheless to nominal damages because "his rights have been infringed." 54 C. J. Section 364, p. 614.

However, we have never contended for this far rule and have felt that technical possession which appellant held against the appellee entitled it to damages at the statutory rate in Idaho—six per cent per annum.

The only estimate of the total value of the appellee's property included that portion appraised by Mr. Parsons at about $20,000.00—interest on this would amount to about $1500.00 for this period of retention. This seems to us a great deal more money than the appellee could have ever gotten out of the property in any other way during that period. Certainly it is more than it got for the seven years it let the property lie without concern on its part on the Lincoln group, and again certainly there is no eviden-

ce that from the 15th of October, 1937, when it had a perfect right to possession at least so far as any obstacle presented by the appellent affected possession, until the very date of trial, a period of four months there was no income derived from the property. It would be well repaid on the standards of its receipts, both before and after detention, if it gets interest.

We think the interest rule is recognized in Idaho in the case of Blackfoot Bank vs. Clements, 39 Idaho 194, 226 Pac. 1079, where the court said:

> "The general rule of damages in actions or replevin, where the plaintiff recovers judgment for the value at the time of the taking, is legal interest on such valuation during the time of detention."
> 54 C. J., sec. 376, p. 623:
>
> "Except where the property in controversy is shown to have a usable value and damages are estimated on that basis, the prevailing party, upon a recovery either of the possession of the property or of its value, may ordinarily be awarded the interest upon the value of the property during the wrongful detention as damages for such detention * * *".
> 23 R. C. L., sec. 73, p. 911:
>
> "In those cases where the property is recovered to the owner the damages are usually measured by interest and depreciation in value. In most cases interest on the value from the time of the wrongful taking is a proper measure. * * *"

Vance vs. W. A. Vandercook Co., 170 U. S. 468, 42 L. Ed. 1111. In speaking of detention of property in a claim and delivery action the court said:

> "Under the decisions to which we have referred, it

is evident that, in the case at bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of Conrad v. Pacific Insurance Co., 31 U. S. 6 Pet. 262 (8:392). In the course of the opinion there delivered by Mr. Justice Story, the court held that the trial judge did not err in giving to the jury the following instruction:

" 'The general rule of damages is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass.' "

Defendants' Requested Instruction No. E. (Tr. 215).

In view of the answer, which denied the right of possession, it was not proper for the court to refuse to instruct the jury about the situation that arose after the answer was filed, to-wit: the withdrawal of the objection by the appellant to the repossession of the property. This was done October 15, 1937, and from then on the appellee had a perfect right, so far as the appellant was concerned, to remove the property and to use it as it pleased.

Defendants' Requested Instruction No. E would have put the situation squarely before the jury and given them

information which was necessary and at least fair and proper for them to have in view of the situation created after the answer was filed.

V.

THE VERDICT AND JUDGMENT WAS NOT IN ACCORDANCE WITH THE REQUIREMENTS OF THE IDAHO CLAIM AND DELIVERY STATUTES.

Coners Assignment No. 7. Which in effect is the variance between the judgment and the requirements of the Idaho statute. (Tr. 216-17).

The verdict of the jury is simply a finding of damages (Tr. 50-51). The judgment likewise (Tr. 56-57).

The value of the property is not fixed in either the verdict or the judgment, and fails to comply with the provisions of Idaho law, Section 7-222, Idaho Code Annotated, which is specifically set forth in Assignment of Error No. 7 (Tr. 216). This statute requires that if the verdict is in favor of the plaintiff the value of the property must be found.

The question of the right of the appellee to all of the property which it owned was removed from this case by the appellant's withdrawal of any obstacle to appellee's entry on the Lincoln group and repossession of the property, which withdrawal was made on October 15, 1937.

So far as delivery by the appellant was concerned it was not a delivery in the manual sense, but admittedly it

was the intent to withdraw whatever claim of ownership the appellant might have by reason of the abandonment of the property by the appellee from October, 1929 to June, 1936, and remove any obstacle to appellee's repossession. We find no case directly in point on that subject but we contend that delivery in the larger sense was had for it was never the duty of the appellant to take the property, much of which was substantially attached to the realty, and actually deliver it over to the appellee—it had a right to get that property when it desired but was forbidden to get it when the appellant refused in June, 1936, to permit the appellee to do the things necessary to take the property into its actual possession. Why the appellee after October 15, 1937, made no attempt whatever to take the property was never explained, and the case was tried February 28, 1938, with the appellant in actual possession in the sense that the property was on the Lincoln group of mines owned by it just as it had been since 1929.

We freely admit that there was no question whatever at the time the court instructed the jury about the appellee's right to take whatever property it owned from the mine—there was a serious question, however, about the description of that property. This arose from the fact that the appelle attached to its amended complaint filed in August, 1937, a full description of the property it claimed (exhibit 'A'). Yet, when it came to proof it did not follow that exhibit but made up a new inventory and introduced it as Exhibit No. 12 (Tr. 86-103). We did not then question and do not now question that Exhibit No.

12 clearly designated the property, but when amendment was sought to substitute Exhibit No. 12 for Exhibit 'A' attached to the amended complaint, the court very properly refused to permit the amendment. (Tr. 152-154).

As the situation then went to the jury there was no definite proof offered that the property claimed by the complaint was the property covered by Exhibit No. 12. Undoubtedly much of it was so described but the shift of base required, it seems to us, the definite finding that the property described in the complaint was really on the ground.

The appellant always throughout the trial took the attitude that any property which belonged to the appellee could be removed (Tr. 60-67-69-70).

A comparison of Exhibit No. 12 with complaint Exhibit 'A' shows many variations and leaves the question of just what property was involved quite in doubt. The appellee could not, of course, under the status of the pleadings and the denial of the right to admit obtain judgment for the delay for damages for detention of the property described in Exhibit No. 12 unless it was described in the complaint exhibit, since all it could recover even in the way of damages or value of the property was the exact property for which it sued, and that was described in the complaint exhibit but not in exhibit No. 12.

There never was any proof offered referring to the property directly at issue because all the testimony on that

point, including value and rental value, was directed to Exhibit No. 12.

While it is true that possession of whatever property the appelle owned was not in question, the appellee never took the property away from the mine, and it seems to us that the wisdom of the statute is particularly applicable here because if when the appellee did begin to take away the property a dispute arose as to just what property belonged to it and just what property did not belong to it, or if during the interim some of it had disappeared, the case would not be finally settled and relitigation must perforce be had to determine the actual value of that part of the property which could not be returned.

Definitely the settlement of the dispute between the parties as wisely required by the statute was not had by this lawsuit. Had the verdict and judgment been returned as required by law this would not be so. We believe the court could not disregard the plain mandate of the statute and provide for quite a different verdict and judgment.

No one questions that this is a claim and delivery action under the laws of Idaho. In fact, the court definitely told the jury:

> "The action is brought under the statute of the State of Idaho, and is commonly known as a claim and delivery statute, which permits the owner of the property to sue for the recovery of it, and if it is found that he is entitled to the return thereof, and return is not made after demand, the jury must find the

market value of the property, and assess damages if any are proven by reason of the taking or detention of the property." (Tr. 188).

Under these circumstances we feel that this defect, added to the several others we have presented, clearly entitle the appellant to a decision of reversal.

CONCLUSION.

The appellant did not contend during the trial and does not now contend that it was right in its early claim in June, 1936, that the appellee could not repossess its property from the mine. It did wrong at least technically, in making that denial. After the appellant came into the case when the amended complaint was filed on August 17, 1937, the objections were withdrawn in October, 1937.

The record, we think, discloses that there was no real harm done to the appellee because the property was withheld from it for a year and four months. It evidently had no concern about the property from October 1929, to June 1936, and must have regarded its possession or its use as utterly valueless since it not only failed to remove it, make use of it in any way, or sell it, but actually did not have a watchman on the ground, or pay taxes, or do anything else to indicate that it had a concern over what it now claims to be very valuable property. Whether this was due to the fact that it was mortgaged for many times its value or due to no market is still a secret with the appelee. The record fails to disclose any reason for the failure of the appellee to take the property into its possession during this seven year period, nor possibly more im-

portant does it show any reason why after the appellant withdrew its objections to repossession in October, 1937, that the appellee did not remove the property or make any attempt to repossess, or use it, or rent it.

Not the slightest bit of evidence was ever introduced by the appellee's President and controlling factor, Mr. Phillips, or by any other witnesses, to show that during the period of detention the property actually could have been rented or sold. The appellant did not use the property and it did not depreciate in value while held.

We admit that we should be subject to some type of penalty, because we denied possession, whether that brought about any actual damages or not, but to penalize the appellant so heavily without any real showing of actual damages or possibility of rental or sale of the property is going too far. The law seems to be that in such a case as this interest at the statutory rate—six per cent per annum in Idaho—is punishment enough for appellant and compensation enough for appellee. From the standpoint of finances the payment of interest to appellee would bring it more money than it got before or after the detention for the use of the property and would more than compensate for any actual damages.

Respectfully submitted,

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OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE
Boise, Idaho
Attorneys for Appellant.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HURON HOLDING CORPORATION,
a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

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.....Clerk.

Filed.....

SUBJECT INDEX

TABLE OF CASES, TEXTBOOKS, STATUTES

TABLE OF CASES, TEXTBOOKS, STATUTES (Continued)

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a corporation,

Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

STATEMENT OF CASE.

This is an action for claim and delivery of personal property under the Idaho statutes, originally brought in the State court by the Lincoln Mines Operating Company, a corporation, against Manufacturers Trust Company, a corporation, Alexander Lewis and Fred Turner. The Manufacturers Trust Company caused the removal of the cause to the Federal court. After removal the Huron Holding Corporation, a corporation, was made a party defendant. (211-39).

Alexander Lewis had died prior to bringing the action. Fred Turner disclaimed. The cause was then tried to a

jury upon the issue framed by plaintiff's Amended Complaint (Tr. 22-36), and the Answer of the Huron Holding Corporation (Tr. 45-48), and the Answer of the Manfacturers Trust Company. The cause was dismissed as to the Manufacturers Trust Company upon its motion made after all parties had rested (Tr. 54), and the issues were finally submitted as between the Lincoln Mines Operating Company and the Huron Holding Corporation.

A verdict was returned in favor of the plaintiff and against the last remaining defendant, and damages were assessed in the sum of $6730.00. (Tr. 55). Judgment was entered accordingly (Tr. 56-57), and from the Judgment the Huron Holding Corporation appeals to this court.

STATEMENT OF FACTS.

Exhibit "A" attached to the Amended Complaint (Tr. 26-36) sets forth the personal property claimed by the Lincoln Mines Operating Company, hereafter called the Operating Company, which it is alleged the Huron Holding Corporation, hereafter called the Holding Corporation, unlawfully detained to plaintiff's damage in the sum of $55,000.00, its value, and also damages for its detention.

The Holding Corporation abandoned its defenses of abandonment of the property by the Operating Company and of the statute of limitations. (Tr. 60,111).

It was agreed that the personal property of the Operat-

ing Company was by it left on the group of claims known as the Lincoln Mines; that the property described in the Harvey Inventory, so-called, includes the personal property of the Operating Company as well as that of the Ojus Mining Company and that of the owners of the claims whoever they might be. (Tr. 110-111).

It was agreed that on April 25, 1933, Jess Hawley, one of the attorneys for the defendant, put Gordon Smith in charge of the Lincoln Mines claims for the owners thereof, and that under the latter's direction one W. A. Harvey, between April 27th and May 8th, 1933, made an Inventory of the personal property then on the mining claims. This Inventory is the Harvey Inventory admitted in evidence as Exhibit No. 1 (Tr. 49-58).

Exhibit No. 12, admitted in evidence (Tr. 86-103) is a copy of the Harvey Inventory from which has been stricken, and on which is indicated, the personal property owned by the Ojus Mining Company and that owned by the owners of the claims, so that which remains uncancelled from Exhibit No. 12 is the property of the Operating Company. (Tr. 71-80).

Alexander Lewis held at all times, and in his name now rests, the legal title to the mining claims (Tr. 52). The personal property owned by Alexander Lewis on June 15, 1932, shortly before the Harvey Inventory was made, is set forth in Exhibit No. 8 admitted in evidence (Tr. 66), and by means of this Exhibit it was possible to eliminate the personal property of the owner of the

claims from Exhibit No. 12 (Tr. 71). There is no dispute in the evidence as to this point, and no question was made respecting the point.

Elmer Fox, Auditor of the Operating Company who made its periodic audits until December 10, 1929 (Tr. 70), was able, and did without question, remove from Exhibit 12 the personal property of the Ojus Mining Company, and identify the property of the Operating Company (Tr. 71, et seq.).

William I. Phillips positively identified the personal property of the Operating Company contained in Exhibit No. 12 (Tr. 84, et seq.). He was President of the Company, lived at the mine where the personal property is located from June, 1932 to February, 1933, and was himself operating the mine and using the personal property.

Thus, both by absolute identification and by elimination, and we might say by agreement, the personal property involved in this suit is definitely set forth in Exhibit No. 12, set forth at pages 86-103 of the Transcript. Neither Elmer Fox nor William I. Phillips was cross examined respecting the identity of the personal property, and no evidence was offered by the defendant to contradict the testimony of these witnesses.

The property of the Operating Company having been identified, the Holding Corporation admits the unlawful detention thereof from June 4, 1936, to October 15, 1937, and those dates were accepted by the Operating Company. (Tr. 59-60, 67-68-69, 110-111).

The Holding Corporation further admitted that the Operating Company is "entitled to recover the property which belongs to the plaintiff, together with such damages as the court will instruct the jury on that point." (Tr. 67). It is also conceded in the appellant's brief (p. 51) that "we should be subject to some type of penalty, because we denied possession, whether that brought about any actual damages or not, but to penalize the appellant so heavily * * * is going too far".

No witness testified as to the value of all of the property of the Operating Company described in Exhibit No. 12, but the value of such part thereof as was appraised by the appellee's witnesses was fixed at $16,949.68 (Tr. 113-117) The appellant's witnesses testified only as to value of certain motors, and never attempted to put a value on any of the other property. The property appraisd by the appellant was lower in value by the sum of $1889.10 than the appraisement of the appellee. Therefore, the undisputed value of such property as was appraised, not being all of that contained in Exhibit No. 12, is the sum of $15,060.58.

Appellee's witnesses also set the rental value of the property appraised at $18,460.64 for the entire period of detention, while appellant's witnesses on the property covered by their testimony put on a rental value lower by $3264.00. Therefore, the undisputed rental value for the period of detention is the sum of $15,196.64. It requires an analysis of the testimony to arrive at these figures. The result of such analysis is as given.

The jury found for the plaintiff appellee, but neither described the property nor placed a value on it. It did fix the damages in the sum of $6730.70. (Tr. 50-51).

ARGUMENT

The majority of assignments of error are not properly before this Court and not subject to review on appeal.

Assignments 1 and 2 (Tr. 198-199) relating to service of summons are not arguable herein, since no Bill of Exceptions with respect thereto is contained in the record. The proceedings and evidence with respect thereto, and with respect to whether the appellant, foreign corporation, was doing business in Idaho, is specifically excepted from the record as evidenced by the trial court's certificate that the record does not include:

> "proceedings, evidence, or bill of exceptions upon hearing of motion to quash service of summons and/or dismissal, or with respect to service of summons, jurisdiction or doing business. (Tr. 194)

Upon presentation of the motion to quash summons it was stipulated that the same is submitted for decision upon "the records and files of said cause, including affidavits" of five individuals, and including "all relevant and material exhibits, depositions, testimony and Bill of Exceptions" in a separate action of record in the trial court, "the same being in the records and files of this court, all of which foregoing shall be deemed to have been admitted in evidence or testified to in this cause" in support of or against said motion (Tr.43).

The affidavits of the five individuals are not included in the record, and there is no way to ascertain what part of the exhibits, depositions and testimony in the case mentioned in the stipulation was before the lower court and considered by it.

Though time was granted within which to prepare Bill of Exceptions on overruling of motion to quash (Tr. 44), no such Bill was prepared or settled within such time, or at all, nor is such a Bill included in the record on appeal.

It has been held by this Court that a Bill of Exceptions is indispensible to review rulings upon motions based upon affidavits or evidence, and none is here presented.

Beach vs. U. S. (CCA 9) 35 Fed. (2d) 837
Wolfe vs. U. S. (CCA 9) 64 Fed. (2d) 566. 567
Reynolds vs. U. S. (CCA 9) 67 Fed. (2d) 217
Laulee, et al. vs. U. S. (CCA 9) 67 Fed. (2d) 156

Assignment 4 relating to sufficiency of evidence was not preserved by motion to dismiss, for non-suit, for directed verdict on that ground, or otherwise. (Tr. 177). At the close of all the evidence appellant moved for a directed verdict only on the grounds that (a) the defendant had not been properly served with summons; (b) the defendant had never been in the jurisdiction of the court; (c) the defendant has not been doing business in the State (Tr. 177). The trial court's attention was not directed to the sufficiency of the evidence by any motion or otherwise.

In Stubbs vs. U. S. (CCA 9) 1 Fed. (2d) 837, 839,

this court stated: "There was no challenge to the sufficiency of the testimony to support a conviction during the trial by motion for a directed verdict or otherwise, and, as a general rule, that objection cannot be raised for the first time by motion for a new trial or in the appellate court. * * * This case forms no exception to the rule."

For a statement of the same rule in this court, see:

Moore vs. U. S., 1 Fed. (2d) 839
Utley vs. U. S., 5 Fed. (2d) 963
Murphy vs. U. S., 35 Fed. (2d) 1019

To properly permit a review of the sufficiency of the evidence to sustain the verdict, a motion for an instructed verdict must be made at the close of the testimony. This was not done here on the ground of insufficiency of the evidence, but was limited to improper service of summons, and the record on that point is not before this court.

Sharples Separator Co. vs. Skinner, (CCA 9) 251 Fed. 25, 27

Continental Nat. Bank vs. Neville, (CCA 9) 285 Fed. 565

United Verde Copper Co. vs. Jaber, (CCA 9) 298 Fed. 97

Assignments 5 and 6 relate to alleged refusal to give requested instructions, and to the giving of certain instructions. We have searched the record on this appeal in vain to find where and when appellant requested any instructions to be given by the court, and to find when and where and upon what grounds the appellant objected to, or reserved exceptions to, the instructions given by the

court. The record is absolutely silent on these two points; the Bill of Exceptions shows no objection or exception to instructions given, and no instructions whatever requested and under the decisions of this court the assignments Nos. 5 and 6, wherein for the first time appear claimed requests and error in instructions given (Tr. 210-216) cannot be reviewed.

In Royal Finance Co. vs. Miller, 47 Fed. (2d) 24, 27, this court, speaking through Wilbur, J. states:

> "The exception to this instruction does not state the ground of the exception as is required of a party in order to present such objections to this court. * * *
>
> "Exceptions to this rule have sometimes been made, where, by reason of requested instructions or otherwise, it is clear that the court was reasonably advised as to the grounds of the exception. * * *
>
> "The exceptions taken to the instruction do not point out the fact that the court has stated, apparently by inadvertence, two inconsistent rules for measuring the responsibility of the appellant. * * *

In the same case, the purpose of the rule is given as follows:

> " * * * the purpose of the rule being to inform the court of the exact nature of the contention of the appellant in order that the court may intelligently pass upon such an objection and modify or withdraw instructions which have been erroneously given. * * * "

Assignment 7 relates to verdict and judgment. The record contains no objection or exception to the form of verdict or to the judgment. (Tr. 55-56). Obviously, the

trial court should have been advised of any claimed deficiencies or irregularities in the verdict at the time the jury made its return, and before discharge of the jury so that correction could be made. Furthermore, the court, in instructions, called attention to the proposed form of verdict and its content (Tr. 193), and appellant made no objection, preserved no exception thereto, and requested no instruction thereon. The objection for the first time on appeal, and especially, as hereinafter pointed out where appellant is not prejudiced, is too late, and presents nothing for review by this court.

In Knollin vs. Jones, 7 Ida. 466, 63 Pac. 638, the appellant assigned as error the vagueness of the verdict in a claim and delivery suit. At page 474 of the decision, the court states that it is unnecessary to discuss the assignment that the verdict is too vague to support the judgment because the question was not raised before entry of judgment, and it came too late. The appellant here never objected to the form of the verdict in the trial court before judgment entered and the verdict can be understood. To the same effect are:

Boomer vs. Isley, 49 Ida. 666, 290 Pac. 405
Pedersen vs. Moore, 32 Ida. 420, 184 Pac. 475
Campbell vs. First Nat. Bank, 13 Ida. 95, 88 Pac. 639
In Re Hellier's Estate 169 Cal. 77, 145 Pac. 1008
38 Cyc. 1904
24 Cal. Jur. 895
2 R. C. L. 86, Sec. 62
27 R. C. L. 853, Sec. 26

ASSIGNMENTS 1 AND 2 (TR. 198-9)

There is sufficient showing of doing business and proper service.

We have heretofore pointed out that these assignments are not reviewable on appeal for want of the record relating thereto.

Appellant does not argue, and hence concedes, that if it was doing business in Idaho it was properly served and the court had jurisdiction. Notwithstanding that the complete evidence and record upon this question are not before this court, evidence in the record primarily with respect to other matters is in itself sufficient to show that appellant was doing business in Idaho. It shows that appellant corporation, and its predecessors, foreign corporations not complying with the laws of Idaho (Tr. 58), attempted to hold, and did operate, real and personal property (the Lincoln Mines) under the name and subterfuge of an individual, Alexander Lewis (Tr. 60-65), who over a period of years from 1926 executed leases thereon, under which active mining was carried on, and out of which active and general mining the owner received royalties (Tr. 65-69, 81, 85, 105-107, 110). New claims were discovered, located and patented, necessary work therefor being done (Tr. 66-67). After the termination of leases in 1933 and to the present, the appellant caused to be done cross-cutting, drifting, and general mining work (Tr. 68-69, 107-110, 161).

That it was doing business in Idaho is so clear as not

to require argument or citation of authority. The cases cited by appellant relate to acts outside the State.

See Boise F. Service vs. General Motors Acc. Corp., 55 Ida. 5; 36 Pac. (2d) 813

John Hancock Mut. L. Ins. Co., vs. Girard, 57 Ida. 198; 64 Pac. (2d) 254

Hoffstater vs. Jewell, 33 Ida. 439; 196 Pac. 194

ASSIGNMENT 3 (TR. 199)

Present existence of an outstanding mortgage did not appear, and even if outstanding was irrelevant and immaterial.

For number 3 appellant assigns as error the refusal to admit in evidence a certain chattel mortgage set forth at page 200 of the Transcript, and the assignment thereof immediately following.

In an action in claim and delivery the right to possession is the main issue; and in the instant action the right to possession is admitted.

Cunningham vs. Stoner, 10 Ida. 549, 79 Pac. 228

Commercial Credit Co., vs. Mizer, 50 Ida. 388, 296 Pac. 580

Preston A. Blair Co., vs. Rose, 56 Ida. 114, 51 Pac. (2d) 209

In Idaho a mortgagee has merely a lien to secure payment of a debt, and the possession remains in someone else.

Forbush vs. San Diego Fruit & Produce Co., 46 Ida. 231, 266 Pac. 659

By virtue of Section 44-811 Idaho Code, 1932, a debt secured by a mortgage carries with it the security.

Therefore, the existence of the chattel mortgage on the personal property could not affect the right of the appellee to possession and use of the security and the naked chattel mortgage without the possession and ownership of the debt secured could affect the situation in no way. The ownership of the debt secured determines the right to the mortgage and the debt secured, being the promissory note described in the mortgage, was not offered in evidence, and so far as the record is concerned its ownership is unknown. It might be in possession of the mortgagor and paid.

No offer was made by appellant to show, and it does not appear, that there was, either at the time of unlawful detainer in 1936 and 1937 or at the time of trial, an unpaid debt secured by the mortgage, or an outstanding mortgage lien. Merely presenting a mortgage executed in 1927, security for a debt due in 1929, and without offering proof that the debt was unpaid, raised no presumption that the debt was unpaid in 1936, 1937 or 1938, and the mortgage still a lien. If there was to be any presumption it should be that the debt secured was paid when due, i.e., January 1, 1929, and this particularly because, being then due, on the face of the record the statute of limitations had run and become absolute.

The assignment (Tr. 206-210) does not purport to assign the debt secured, and there is no evidence that

there ever was an assignment of the promissory note. In any event, assignee Helen S. Pearson makes no claim to the debt secured, and the debt secured cannot be enforced as it is barred by the statutes of limitations. Section 5-216 Idaho Code, 1932. The mortgage was properly rejected as evidence.

Appellant apparently labors the point that since there may have been an outstanding chattel mortgage, appellee could not under Idaho statutes remove, sell or rent the property without consent of the mortgagee. But it is conceded appellee was entitled to possession. There is no statutory or other prohibition on use of the property by appellee; no prohibition on renting the property. It was under the statute cited removable from the property of appellant and within the County without penalty, and without consent. It was removable from the County without consent and usable therein, and was saleable and rentable after such removal, and without consent, the statute not declaring such acts void, but only that the mortgage is unaffected (Sec. 44-1007), and if *both* removal and sale had, imposing a criminal penalty upon the mortgagor (Sec. 17-3907; State vs. Olsen, 53 Ida. 546, 26 P. (2d) 127).

In other words, the mortgagor may validly remove, use, sell and rent within or without the County. If done without consent of mortgagee, and without the County, a sale (and use, possession or renting) is valid, but subject to the mortgage, and (assuming validity of the criminal statute; very doubtful with its omissions of Chapter and

Title) in case of sale the mortgagor may be criminally prosecuted.

Furthermore, it was not necessary to have consent to remove from appellant's unlawful possession—all that appellant is interested in. Where mortgagor took, or what he did with, the property, or what personal penalty appellee might be subject to, are immaterial, irrelevant and no concern of appellant. It makes its unlawful detainer no less unlawful; it does not minimize appellee's damage.

And appellant was under no duty to hold the property for the mortgagee, nor inquire as to consent. Nor was appellee burdened with proof of consent, having full legal right of control and use of the property. If a defense, it was appellant's burden to prove want of consent.

Appellant at the trial conceded and so advised the trial court, that these exhibits were not admissible, except upon the one issue of value of the property (Tr. 112-113). It did not even argue, as it does now, its admissibility upon value of use or rental value; and it does not argue now that they had any relevancy on value of the property. Appellant thus shifts ground, and having concurred with the trial court is estopped to urge an entirely new ground not presented to the trial court.

The mortgage and assignment were irrelevant and immaterial for any purpose, or upon any issue.

ASSIGNMENT 4 (TR. 210)

Is not before the Court; there was evidence to sustain the verdict and judgment.

We have heretofore pointed out that no motion was made at the trial which preserved for review the matter of sufficiency of evidence.

The assignment limits the alleged lack of substantial evidence only with respect to part of the property unlawfully detained, i.e., mine and mill machinery. The assignment concedes sufficiency therefore with respect to all other property. Since the damages allowed by the jury are not set forth separately as to the various properties, appellant cannot argue that the jury did not, in fact, eliminate, as appellant seeks to do, the items about which there is claimed to be insufficient evidence. The fact that the jury did not allow the full amount claimed and testified to, indicates that it used discrimination in this respect. There being substantial evidence to sustain the verdict and judgment in the case as a whole does not permit reversal because upon some one item of the whole there may have been no evidence at all.

Under assignmet number 4 it is stated that there is no *substantial* evidence that the property could have been rented or used during the unlawful detention. This admits the existence of some evidence, and the jury has passed upon the same. The assignment is also predicated upon the theory that before rental or use value can be the measure of damages it must be proved that there was either actual rental or use of the property.

Plaintiff was entitled to the usable value regardless of whether or not it be shown to have hired other property to take its place, or to have rented the same.

Stanley W. Smith Inv. vs. Pilgrim, 117 Cal. App. 244, 3 Pac. (2d) 573

Ferris vs. Cooper, (Cal.) 13 Pac. (2d) 536

Damages are not confined to interest if the value of the use exceeds the interest.

Nahhas vs. Browning, 181 Cal. 55, 183 Pac. 442, 6 A. L. R. 476

The reason for the rule is simple. If the interest is less than the usable value, the wrongdoer would profit by his wrong doing if permitted to claim the interest on the investment rather than the rental value as the basis for damages. Mr. Arnold testified that the reasonable market rental value of that type of equipment is ten per cent of the value of the equipment per month (Tr. 147).

Mr. Parsons testified that ten per cent per month of the depreciated value of the equipment, meaning the value when it goes out, is the rental value of such property. (Tr. 119, 120). Both Mr. Arnold (Tr. 146-147) and Mr. Parsons (Tr. 113-117) were qualified to testify to the rental or usable value of the property as well as the actual value of the property.

The appellant called William A. Hopper as its witness to testify as to the value of the motors only. Although he was qualified to testify as to rental value (Tr. 157), he was never asked for that information. He was the only witness qualified to dispute the testimony of Arnold and Parsons, and he did not question the testimony of the appellee's witnesses. Therefore, the evidence as to rental

value is undisputed and all allowances for difference in sale value have been explained and granted above.

And it may be pointed out that appellant should not be heard to complain that rental value was testified in an amount exceeding value, since the jury in fact allowed only about one-third of such sum. The jury may also have allowed, under the instruction of the Court (Tr. 189-90) rental on some items, allowed interest on others, and rejected others entirely, particularly those on Exhibit 12 and not described in the complaint. It was a matter peculiarly within the province of the jury, and it is useless to speculate as to the manner or method by which they arrived at their conclusions since the fact remains that their verdict was within the limits shown by the evidence, and is sustained thereby.

ASSIGNMENT 5, (TR. 210)

Is not before the Court; the alleged requested instructions were erroneous, or covered by the trial court's instructions.

We have hereinbefore pointed out that the Bill of Exceptions shows no requested instructions nor exceptions for failure to give requests. They are not, therefore, before this court for review.

There was no error in refusing to direct a verdict for the Holding Corporation. The motion for a directed verdict (Tr. 177) was on the ground that the defendant had not been properly served with summons, and that the court did not have jurisdiction of the defendant. As already

pointed out, the record does not contain all of the proof before the court on this matter, and the appeldant is in no position to have the question reviewed on appeal.

Appellant does not press as error refusal to give requested instructions numbered 5 and 8 (Tr. 211), and we pass them. Instructions numbered 10 requested by appellant (Tr. 212) is not a correct statement of law, because it would preclude the plaintiff from recovering the rental value of the property, unless it had ability to use or rent the same, although the defendant may have used the property. In other words, if the plaintiff could not have used or rented the property the defendant would be liable only for the interest on the value of the property, although it might have saved money by not renting the same or other property.

This rule of law would permit the defendant to profit by its own wrong, and that is not the purpose or the intent of the rule of damages as previously stated. The court's instruction covered this matter (Tr. 189-90).

As counsel frankly states in the brief at page 41, "the main point in our attack—the appellee was not damaged actually by the detention of the property because it could not have actually used it or rented it." Appellant quotes from 8 Ruling Case Law, pp. 487-489 (Bried, p. 40),—"Ordinarily the measure of damages for the loss or destruction of property * * *" which does not apply in the instant case because none of the property is shown to have been either lost or destroyed. The contention is over the rental value, not the market value of the property.

While ordinarily interest on the value of the property may be the measure of damages, nevertheless "damages in a replevin suit for wrongful taking and withholding of the property are not confined to interest if the value of the use of the property exceeds the interest." 5 Cal. Jur., p. 207. This was the rule in Nahhas vs. Browning, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442. It is also said in Crawford vs. Meadows, 55 Cal. App. 4, 203 Pac. 428, "But where the property has a usable value which exceeds the lawful rate of interest this rule (of interest on market value) has no application". To the same effect is Ruzanoff vs. Retail Credit Ass'n., 97 Cal. App. 682, 276, Pac. 156.

> "Where, however, the property has a usable value which exceeds the lawful rate of interest, the successful party is entitled to recover as damages for the detention, the reasonable value of such use during the period that he was wrongfully deprived thereof * * *. The reason for this rule is that interest or the value of the property does not furnish adequate compensation for the wrongful detention. If recovery were limited to those items, the wrongdoer who has had the use of the property would often make a profit out of his own wrong, which the law does not tolerate; and the sufferer would be denied damages which naturally and certainly follow from the wrongful invasion of his rights. This value is to be *estimated* by the ordinary market price of the use of the property—in other words, the rental value."
>
> 5 Cal. Jur., 208
>
> Mutch vs. Long Beach Imp. Co., 47 Cal. App. 267, 190 Pac. 638
>
> Gustafson vs. Byers, 105 Cal. App. 584, 288 Pac.

Drinkhouse vs. Van Ness, 202 Cal. 359, 260 Pac. 869

Blodgett vs. Rheinschild, 56 Cal. App. 728, 206 Pac. 674

"In an action for claim and delivery of personal property, the party aggrieved is entitled to the usable value regardless of whether or not he be shown to have hired other property to take its place."

Stanley W. Smith vs. Pilgrim, 117 Cal. App. 244, 3 Pac. (2d) 573

Ruzanoff vs. Retailers Credit Assn., 97 Cal. App. 682, 276 Pac. 156

Appellant cites Blackfoot City Bank vs. Clements, 39 Ida. 194, 226 Pac. 1079, in support of the rule that the damages are measured by legal interest on the valuation of the property. In this case, the property involved were ewes with young lambs or lambing, and that property had no usable value. Therefore, the interest on the value would be the measure of damages. In this same case, the Idaho court says, in substance, that because of the facts and circumstances "of a case of this nature" there is no fast rule for proving value; and the only available market would be at or near the vicinity where the sheep were because they were ewes with young lambs or lambing. And so in the instant case, because mining machinery and equipment can only be rented or used where there are mines, there is some difficulty in proving and no fast rule for establishing the value or the usable value of the particular property. Appellant concedes (Brief, pp 41, 42) that both requested instructions numbered 10 and 11 are

susceptible of a construction which would make them improper.

In Tannahill vs. Lydon, 31 Ida. 608, 610; 173 Pac. 1146, the trial court instructed the jury that "the measure of plaintiff's damage herein is the value of the property so wrongfully taken at the time of the taking, with reasonable value of the use of the said mare from the time of the taking to this date." The mare had not been returned, nor the period of unlawful detention otherwise terminated. The court held the instruction not erroneous "because not accompanied by considerations of whether the property could have been constantly employed by plaintiff at a given rate of earnings by letting for hire, or by employment at home."

The Supreme Court of Idaho stated that "the instruction as given had been repeatedly approved by this court." (Page 611 of the report). In commenting on the amount of the rental value the court said:

> "It may well be that where property has usable value, the damages resulting from wrongful detention if the property is detained long enough will far exceed the actual value of the property detained, and the owner of the property, if entitled to possession, is also entitled to whatever damages he sustains by being deprived of that possession."

And continuing:

> "Otherwise, he would be put in the position of being compelled to submit to conversion against his will."

Requested Instruction No. 14B (Tr. 214) is erroneous

because it denies any damages whatever, either by way of interest or usable value or nominal damages. And this despite the admission of unlawful detention during the entire period. And appellant admits (Brief, p. 43) that appellee was entitled to damages equal at least to interest.

Requested Instruction No. 14C was properly denied, because defendant admitted unlawful detention of the property and, therefore, it only remained for the jury to apply the correct measure of damages which has been argued before. Further, the court did instruct upon the necessity for use and a market rental value (Tr. 189-90, 192).

Requested Instruction No. E (Tr. 215) was properly refused because the only period of unlawful detention was between June 4, 1936, and October 15, 1937, and this point was fully covered in the instructions given (Tr. 191). In fact, the substance of all parts of the requested instructions which should have been given were given by the court.

The court did not err as stated in Assignment No. 6, by instructing in the method of determining the reasonable value of the use. The determination of the reasonable rental value is not dependent upon the right of the Operating Company to remove the property as argued by appellant at page 31 of its Brief. We are here proving the usable value and the market value, and the rule by which both are established is not dependent even upon the existence of the property at the time the proof is submitted.

The appellant could have destroyed the property, and yet the rule would remain as stated in said instruction. Appellant concedes removal could have been had with consent of mortgagee and failed to show want of consent, and we have above shown right of removal in any event.

ASSIGNMENT 7 (TR. 216)

Is not properly before this court. If irregular, there was no prejudice to appellant.

We have hereinbefore shown that no objection or exception having been taken to the verdict either before or after return thereof by the jury, this question is not reviewable.

Assignment No. 7 is that the judgment and verdict do not comply with the form required by the Idaho statute. The verdict is set forth in the transcript at page 50, and the statute at page 216. The verdict returned is certain and definite in two respects,—first, it finds in favor of the plaintiff; and second, it assesses plaintiff's damages in the sum of $6730.70. The appellant cannot be injured by the failure of the jury to find the value of the property which would be paid in lieu of the delivery of the property. This would relegate the plaintiff to the property alone, and if it could not be returned then the plaintiff could not take any money under this verdict.

Having found for the plaintiff, it means that the plaintiff is entitled to have possession of the property. The question then arises, what property? The answer is, the

property agreed to be that of the plaintiff, which is the property remaining in the Harvey Inventory after the property of the Ojus Mining Company and that of the owners of the mining claims have been stricken, and this is contained in Exhibit No. 12. There never was any contention throughout the proceedings that the property involved was not that remaining in the Harvey Inventory after deletion, and there is no question concerning the accuracy of the deletion. Therefore, the verdict is understandable, clear and can be enforced as contained in the judgment.

The appellant is inconsistent. It argues that to all intents and purposes and in law it delivered appellee's property to it on October 15, 1937, long before trial, and if that be true then the only statuory condition requiring finding of value, i. e., "if the property has not been delivered to the plaintiff", did not exist, and the verdict was clearly within the terms of the statute. The form of verdict and judgment was not prejudical to appellant, and it points out no injury to it. Hence, even if irregular, appellant cannot complain.

Attention is invited to the case of Blackfoot Stock Co. v.s Delamue, 3 Ida. 291, 29 Pac. 97. This was an action in claim and delivery, in which the defendant claimed redelivery on the ground that he held a lien on the cattle involved. The following verdict was returned:

> "We, the jury in the above entitled action, find that the defendant recover of and from the plaintiff the sum of $679.50 for the keeping and care of the

> cattle mentioned in the complaint, and that defendant have a lien on said cattle until said amount is paid."

In this verdict there is neither a description of the property nor a value placed thereon, but the amount of the lien is fixed as a money judgment against the plaintiff. Upon this verdict a judgment was entered:

> "Wherefore, * * it is ordered, adjudged and decreed that said Andrew Delamue have and recover from said Blackfoot Stock Company the sum of $679.50 * * * and the return and possession of the said cattle mentioned in the complaint * * *".

The Supreme Court of Idaho upheld the verdict and the judgment. And in neither was the property described or the value thereof fixed. This was partly because the parties conceded the ownership of the cattle and the value. In the instant case, the only thing to be determined by the jury was the damages.

It is to be noticed that the appellant limits its objection to the verdict to the single proposition that the same does not find the value of the property detained. As pointed out, this cannot injure the appellant. The appellant accepts the verdict otherwise. (Tr. 216-217).

Conclusion

It is clear from appellant's brief that actually it makes one complaint only—excessive damages— which was neither brought to the attention of the trial court nor assigned as error. It is not contended that the jury rendered its verdict under the influence of passion or prejudice.

Appellant admits that it did a wrong; that it did unlawfully detain a large and valuable quantity of appellee's property; that it should respond in damages more than nominal. It has failed to preserve for review, or to sustain, objections it now makes. It would appear that the appeal was perfected and prosecuted for delay, permitting of the application of the statute. Sec. 878, Title 28 U. S. C.

> "Where, upon a writ of error, judgment is affirmed in a Circuit Court of Appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

And rule 30 (2) of this court.

Appellant can claim no equitable consideration or mitigation. It had the inventory of such of the property on the premises as belonged to it; it knew that appellee had operated the mines and was entitled to large quantities of the property; it admits unlawful detention and damage, yet its claim that such detention ceased October 15, 1937, is based not on an offer to return any specific property claimed but only generally such property as appellee could convince appellant was owned— a source of further controversy and litigation—and unaccompanied with any tender of payment of admitted damage for its unlawful detention of over one year. In line with a policy of escaping liability for its acts by unlawfully doing business and holding title to realty in Idaho under the name of an employee, Alexander Lewis, it sought to escape jurisdiction of the court in Idaho, and by every means to escape re-

sponding in damage for its admitted wrong, and now appeals upon unreviewable or shallow grounds.

A review of the record indicates that the jury took all matters into consideration and accepted the agreement of all parties that the property was unlawfully detained between June 4, 1936 and October 15, 1937; that the property involved was what remained in the Harvey Inventory after eliminating the property of the Ojus Mining Company and the owners of the claims; and upon the evidence concluded that the damages which the plaintiff had sustained was not the sum of $18,460.64 claimed by plaintiff, nor the sum of $15,196.64 determined by deducting from plaintiff's claim the amounts testified to by the defendant, but was the sum of $6,730.70.

This clearly indicates full consideration was given by the jury to all evidence respecting the character of the property involved, the rental value of the same, the fact that all of the property was not appraised, the fact that there is no evidence respecting the rental value of all of the property detained but merely of a part of the property, the fact that the defendant first denied all unlawful detention and claimed a forfeiture of the property and finally admitted liability, the fact that the defendant never offered any property to the plaintiff unequivocally, but merely said, "come get what you can prove", the fact that the property was detained without reason for appellant's development purposes and without opportunity to appellee to appear upon the property to aid in a sale thereof.

To review the assigned errors we repeat, respecting assignments Nos. 1 and 2, the record is not certified to this court and can not be reviewed. Respecting assignment No. 3, the evidence offered, the chattel mortgage and the assignment thereof, was without foundation for want of the debt, and was also immaterial and irrelevant. Respecting assignment No. 4, the sufficiency of the evidence cannot be reviewed for want of a motion for instructed or directed verdict, and any other motion by appellant to bring the matter to the attention of the court below. Respecting assignments Nos. 5 and 6, the record is silent, both as to a request for instructions or any objection to the instructions given, and the same cannot be called to the attention of this court for the first time on appeal. Respecting assignment No. 7, the verdict is not reviewable for want of objection at the trial, and does not injure the appellant, nor is the same uncertain for the assigned reason that it does not contain the value of the property involved, or for any other reason.

Respectfully submitted,

.....

W. H. Langroise

.....

Erle H. Casterlin

.....

Sam S. Griffin

ATTORNEYS FOR APPELLEE
Residence: Boise, Idaho

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY, a Corporation, and ALEXANDER LEWIS,

Appellees.

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

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Appellees.

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On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

SERENES T. SCHREIBER,
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Boise, Idaho,
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OSCAR WORTHWINE
Boise, Idaho,
Attorneys for Appellees.

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IN THE DISTRICT OF THE THIRD JUDICIAL DISTRICT IN THE STATE OF IDAHO IN AND FOR ADA COUNTY.

WILLIAM I. PHILLIPS,

Plaintiff,

vs.

MANUFACTURERS TRUST COMPANY (a corporation), and ALEXANDER LEWIS

Defendants.

COMPLAINT

Filed in the State Court February 8, 1937.

The plaintiff complains of the defendants and alleges:

I.

That at all of the times hereinafter mentioned the above named defendant, Manufacturers Trust Company was and is a banking corporation engaged in general business and banking in New York City, State of New York, and is doing business in the state of Idaho, and as such had the transactions as hereinafter set forth, though its officers reside in New York.

II.

That as plaintiff is informed and believes and therefore upon such information and belief alleges, that the above named defendant through its officers, directors, and agents, and prior to the times hereinafter particular-

ly set forth entered into a conspiracy to defraud this plaintiff and others through the fraudulently leasing and optioning of certain mineral and mining property in the State of Idaho to-wit:

The Alice, Lincoln, and Lookout quartz mining claims being survey No. 1765 and the North Lincoln Lode described as follows:

Beginning at corner No. 1 identical with No. 1 survey No. 2520 Kingston Lode whence corner of sections 15, 16, 21, and 22, T. 6 N., R. 1 E. B-M bears N. 16° 36′ W. 644 feet thence S. 9° 12′ W. 600 feet to corner No. 2 identical with corner No. 2 survey No. 2520 Kingston Lode: Corner No. 2 Lookout and Corner No. 1 Lincoln Lodes, both of survey No. 1765, thence N. 72° 32′ W. 1493.7 feet to corner No. 3 identical with corner No. 4 Lincoln and corner No. 1 Alice Lodes both of survey No. 1765, thence N. 9° 12′ E. 600 feet to corner No. 4 thence S. 72° 32′ E. 1493.7 to corner No. 1, the place of beginning containing 20.361 acres more or less.

The Annie Laura Lode described as follows: Beginning at corner No. 1 whence ¼ section corner between section 21 & 22 T. 6 N. R. 1 E. B-M bears S. 0° 19′ E. 800.3 feet, thence N. 82° 30′ W. 1156.4 feet to N. No. 2, thence N. 12° 20′ E. 232 feet to corner No. 3 situated on line 23 survey No. 1765 Lincoln Lode, thence S. 71° 03′ E. 1160 feet to corner No. 4 identical with corner No. 3 Lookout and

corner No. 2 Lincoln Lodes both of survey No. 1765 thence S. 12° 20′ W. 1 foot to corner No. 1 place of beginning containing 3.082 acres more or less;

and which record title purports to be and is recorded in the office of Recorder of Gem County, Idaho, in the name of one Alexander Lewis, also a defendant herein.

III.

That acting pursuant to said conspiracy said defendant Alexander Lewis upon his own behalf and as agent of said Manufacturers Trust Company, its officers and directors and in the course of his duties and employment as such on or about the 19th day of Nov. 1931, year, falsely and fraudulently by himself, and through his agents, and joint co-conspirators and their agents made an option and an agreement of lease in writing of the above described mining property to plaintiff for a valuable consideration on the above described premises, representing that he was the true owner of that certain property and mining premises, and plaintiff relying thereon and believing the said representations as true in fact when they were false and untrue and known and made by defendants with the intention to deceive and ultimately defraud the plaintiff; nevertheless caused, procured and induced plaintiff to accept the same in good faith, and to enter upon said premises and make large expenditures for improvements, and machinery, and in developing said mining claims, and mining the same, and paying out sums of money as royalty thereunder to defendants and as plaintiff is further informed and

believes, with full knowledge and acquiescence of defendant, Manufacturers Trust Company, its officers and agents, and in the course of their employment of said company as agents of said bank, greatly to plaintiff's injury and damage, and did finally dispossess and deprive the plaintiff of all his rights and interest in said premises because of the fraudulent option and lease, and by the unlawful and illegal assignments in blank attempted and made thereof which were deceitfully and secretly held by the Manufacturers Trust Company, defendant herein, and which ultimately deprived this plaintiff of all his interest, and resulted in a total loss and damage to plaintiff in the sum of approximately Five Hundred Thousand ($500,000.00) Dollars.

IV.

That on or about February 15, 1934, after said plaintiff discovered the falsity of said representations and the deceitful acts of the defendants, he ceased operating and developing said mining property and delivered the same to the defendants on their demand, and then and there demanded a return to him of the moneys so paid and expended, all of which defendant, Manufacturers Trust Company has, and has now the benefit of and is unjustly enriched thereby, and none of which sums or amounts have been repaid to the plaintiff but remain due and owing from defendants to plaintiff herein together with legal interest thereon.

WHEREFORE, plaintiff prays judgment against

said defendants in the sum of Five Hundred Thousand ($500,000.00) Dollars with interest from February 15th, 1934, at the legal rate together with cost and disbursement in this action.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence Boise, Idaho.

(Duly verified)

(Title of Court and Cause)

SUMMONS

RECEIVED SHERIFF'S OFFICE

Feb. 8, 1937
Ada County, Idaho
4:45 P. M.

RECEIVED SHERIFF'S OFFICE
Feb. 12, 1937
Ada County, Idaho

RECEIVED SHERIFF'S OFFICE
Feb. 10, 1937
Gem County, Idaho
Filed in the State Court
February 27, 1937

THE STATE OF IDAHO

Sends Greetings to the above named defendants.

YOU ARE HEREBY NOTIFIED That a complaint has been filed against you in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, by the above named Plaintiff, and you are hereby directed to appear and plead to the said complaint within twenty days of the service of this summons.

.....

.....

.....

.....

and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint.

WITNESS my hand and the seal of said District Court, this 8th day of February, 1937.

(Court Seal) STEPHEN UTTER,
S. T. SCHREIBER, Clerk.

Attorney for Plaintiff By B. CLYDE EAGLESON

Residing at Boise, Idaho. Deputy Clerk.

RETURN ON SUMMONS

State of Idaho)
County of Ada) ss.

I hereby certify and return that I received the annexed summons on the 8th day of February, 1937, and I further certify that I personally served the same on the 8th day of February, 1937, on the Manufacturers Trust Company, a corporation, one of the defendants named in said summons, by delivering to and leaving with Stephen Utter, County Auditor, of Ada County, Idaho, personaly at Boise, County of Ada, State of Idaho, a copy of said summons tohether with a copy of the complaint in said action attached to said copy of summons. The defendant, Manufacturers Trust Company, a corporation, is a foreign corporation, and does not have any designated person or agent actualy residing in Ada County, Idaho, upon whom process can be served. The Secretary of the State of the State of Idaho, states, that the said defendant Manufacturers Trust Company, has not filed a designation of Agent in his office. Service on the said Manufacturers Trust Company, a foreign corporation, was made pursuant to the provisions of paragraph 3 of 5- 507 Idaho Code Annotated.

Dated at Boise, Ada County, Idaho, this 8th day of February, 1937.

Don Headrick, Sheriff
By Heath Sebern
Deputy

Subscribed and sworn to before me this 8th day of February, 1937.

Stephen Utter
Clerk of the District Court,
Ada County, Idaho.

By Chloe B. Burnett, Deputy Clerk.

RETURN ON SUMMONS

SHERIFF'S OFFICE)
COUNTY OF GEM,) ss.
STATE OF IDAHO)

I, Boise G. Riggs, Jr., Sheriff of Gem County, Idaho, do hereby certify and declare that I received the within summons for service on the 10th day of February, 1937, and that I served said summons on said Manufacturers Trust Company, a corporation, one of said defendants, by delivering to Lillian M. Campbell, personally in Gem County, Idaho, on the 10th day of February, 1937, a true copy of said summons together with a true copy of the complaint mentioned in said summons, said Lillian M. Campbell, then and there being the Clerk, Auditor and Recorder of Gem County, Idaho.

I further certify that I left a copy of said summons together with a true copy of the complaint attached to said copy of summons with Lillian M. Campbell, personally in Gem County, Idaho, on the 10th day of February,

1937, for service on the President of the Manufacturers Trust Company, a corporation, as per Chapter 5, Section 507, Idaho Code Annotated.

I further certify that after due search and diligent inquiry that I am unable to find the defendant, Alexander Lewis, in Gem County, Idaho.

Dated February 10th, 1937.

FEES:

Service of summons...$2.00

Mileage .....$ .20

Return .....$ .40

——

Total $2.60

(Seal)
Sheriff's .....
Paid Feb. 11, 1937
Gem County. .....

Boise G. Riggs, Jr.,
Sheriff of Gem County,
Idaho.

Subscribed and sworn to before me this 10th day of February, 1937.

J. P. Reed,
Notary Public for State of Idaho, *Rseidence* Emmett, Idaho.
Sheriff's Office
Paid Feb. 11, 1937
Gem County, Idaho.

(COPY)

Filed in the State Court
February 27, 1937

February 10, 1937

Manufacturers Trust Company
555 Broad Street
New York City, New York

Attention: Mr. Harvey D. Gibson, President

Dear Sirs:

Enclosed herewith summons and copy of complaint in the case of William I. Phillips vs. Manufacturers Trust Company, which was served on me as Auditor of Gem County and forwarded to you as required by our statutes.

Very truly yours,

LMC:LL Enc. 1 Auditor
(Registered)

STATE OF IDAHO)
COUNTY OF GEM.) ss.

I, Lillian M. Campbell, Ex-Officio Auditor of Gem County, Idaho, do hereby certify that the above is a full, true and correct copy of the copy of letter addressed to Manufacturers Trust Company, 55 Broad Street, New York City, New York, under date of February 10th, 1937.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 26th day of February, 1937.

Lillian M. Campbell
(SEAL) Ex-Officio Auditor
Gem County, Idaho

(COPY)

MANUFACTURERS TRUST COMPANY
Fifty-Five Broad Street
New York, N. Y.

February 15, 1937

Miss Lillian M. Campbell, Auditor
Gem County
Emmett, Idaho

Dear Madam:

This is to acknowledge receipt of your favor of the 10th instant enclosing summons and complaint in the matter of William I. Phillips against Manufacturers Trust Company and Alexander Lewis, as stated, for which please accept our thanks.

Very truly yours,
William L. Schneider
William L. Schneider
Vice President

STATE OF IDAHO,)
COUNTY OF GEM.) ss.

I, Lillian M. Campbell, Ex-Officio Auditor of Gem County, Idaho, do hereby certify that the above is a full, true and correct copy of letter received from William L. Schneider, Vice President of the Manufacturers Trust Company, under date of February 15th, 1937.

IN WITNESS WHEREOF, I have hereunto set my

hand and affixed my official seal this 26th day of February, 1937.

(SEAL)

Lillian M. Campbell
Ex-Officio Auditor
Gem County, Idaho

(Title of Court and Cause)

NOTICE

Filed in the State Court
February 27, 1937

TO THE ABOVE NAMED PLAINTIFF AND TO S. T. SCHREIBER, ESQ., HIS ATTORNEY:

PLEASE TAKE NOTICE, That the defendant, Manufacturers Trust Company, herein will on the 27th day of February, 1937, file in the above entitled court its petition and bond for the transfer and removal of the above entitled action from the court wherein said cause is now pending into the District Court of the United States, for the District of Idaho, Southern Division, a copy of which petition and bond are herewith served upon you, and in accordance with and pursuant to said petition and bond, will, on Thursday, March 4, 1937, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard, present the same to the Honorable Charles F. Koelsch, Judge of the above entitled court, in his chambers of said court at Boise, Ada County, Idaho, and

prays for an order approving said bond and removing said cause to said District Court of the United States for the District of Idaho, Southern Division.

DATED this 27th day of February, 1937.

Hawley & Worthwine
HAWLEY & WORTHWINE,
Residence: Boise, Idaho.
Attorneys for Defendants.

Service by receipt of copy of the foregoing notice and papers therein referred to, is hereby admitted this 27th day of Feb., 1937.

S. T. Schreiber
S. T. SCHREIBER
Attorney for Plaintiff,
Residence: Boise, Idaho.

(Title of Court and Cause)

PETITION FOR REMOVAL
Filed in the State Court
February 27, 1937

TO THE HONORABLE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA:

COMES NOW, Your Petitioner, Manufacturers

Trust Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, a resident and citizen of the State of New York, with its principal place of business being in New York City, said State of New York, and respectfully shows and represents to this Honorable Court.

I.

That this is a suit of civil nature and that the amount in dispute between the plaintiff and the defendants exceeds, exclusive of interest and costs, the sum of $3,000.00. That this is an action commenced and maintained by the plaintiff to secure a judgment against the defendants for the sum of FIVE HUNDRED THOUSAND DOLLARS, ($500,000.00), together with costs of suit as will more fully appear from the plaintiff's complaint on file herein.

II.

That the said action was commenced in the above entitled court on the 8th day of February, 1937, and that Summons was issued out of said court in said cause and was on that day served on Stephen Utter, Auditor and Recorder of Ada County, State of Idaho; upon the theory and under the claim that service on said Auditor and Recorder is service upon the said defendant corporation, Manufacturers Trust Company; that the time of appearance on the party of the defendants has not expired; and that the defendant, Manufacturers Trust Company, has appeared specially in said action by motion to quash service of said summons and complaint.

III.

That your petitioner avers that at the time of the commencement of this action, and ever since, the plaintiff, has been and now is a citizen and resident of the State of Idaho; that the defendant, Manufacturers Trust Company, a corporation, at the time of the commencement of this action, and ever since, has been and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is not now, and never has been a resident and citizen of the State of Idaho, but is a resident and citizen of the State of New York; that the defendant, Alexander Lewis, is a citizen and resident of the State of New York, and is not now, and never has been a resident of the State of Idaho, but is a resident and citizen of the State of New York; that service of said summons and complaint have not been made upon the said Alexander Lewis and he has not appeared in person or by an attorney in the above entitled court and cause.

IV.

That the District Court of the United States for the District of Idaho, Southern Division thereof, has *jurisdiction* original jurisdiction of this action, and that your petition desires that said action be removed from the court wherein it is now pending into the said District Court of the United States, for the District of Idaho, Southern Division.

V.

That this controversy and every issue of law and fact therein is between citizens and residents of different states

—the plaintiff being a citizen and resident of the State of Idaho, and the defendants being citizens and residents of the State of New York, and that more than $3,000.00, exclusive of interest and costs, is involved herein.

VI.

Your petitioner offers herewith a bond with good and sufficient surety for its entry in said District Court of the United States, in and for the District of Idaho, Southern Division, sitting at Boise, Idaho, within thirty days from the date of filing of this petition, a certified copy of the record in this case and for paying all costs that may be awarded by said District Court of the United States, if it shall hold that such suit was wrongfully and/or improperly removed thereto, and as provided by the statutes of the United States in such cases made and provided.

Your petitioner therefore prays this court to proceed no further herein except to make the order of removal as required by law and the statutes of the United States, and to accept and approve said bond and surety, and to cause the record herein, as aforesaid, to be removed into the District Court of the United States, in and for the District of Idaho, Southern Division.

And your petitioner will ever pray.

Hawley & Worthwine
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Petitioner.

(Duly verified)

(Title of Court and Cause)

BOND ON REMOVAL
Filed in the State Court
February 27, 1937

KNOW ALL MEN BY THESE PRESENTS, That Manufacturers Trust Company, a corporation, as principal, and National Surety Corporation, a corporation, as surety (said surety being duly and fully authorized under the acts of Congress and laws of the State of Idaho) are held and firmly bound unto the above named plaintiff, William I. Phillips, in the sum of FIVE HUNDRED DOLLARS ($500.00), for the payment of which well and truly to be made unto the said plaintiff and his assigns, it binds itself, its heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents; upon condition nevertheless that

WHEREAS, the above named plaintiff has heretofore brought a suit of civil nature in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, against Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants; and

WHEREAS, the said defendant, Manufacturers Trust Company, simultaneously with the filing of this

bond, intends to file its petition in said suit in such state court for the removal of such suit into the District Court of the United States for the District of Idaho, Southern Division, the District in which the said suit is pending according to the provisions of the Acts of Congress in such case made and provided.

NOW, THEREFORE, the condition of this obligation is that if the said petition shall enter in the District Court of the United States for the District of Idaho, Southern Division, within thirty days from the date of the filing of said petition, a certified copy of the record in such suit and shall pay all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully and/or improperly removed thereto, and shall also appear and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in fully force and virtue.

Dated this 27th day of February, 1937.

MANUFACTURERS TRUST COMPANY,
a corporation,
By Jess Hawley,
One of its Attorneys, and
authorized to sign this bond.

NATIONAL SURETY CORPORATION,
a corporation,
By Frank G. Ensign
Frank G. Ensign,

Its Attorney In Fact.

Countersigned: (SEAL)
Frank G. Ensign
Frank G. Ensign,
Resident Agent,
Residing at Boise, Idaho.

(Title of Court and Cause)

MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT.

Filed in the State Court
February 27, 1937

COMES NOW, the defendant, MANUFACTURERS TRUST COMPANY, a corporation, by its Attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.

II.

That service of summons and complaint in this case has never been made upon the said defendant, Manufacturers Trust Company, by personal service or otherwise, but that on or about the 8th day of February, 1937, the plaintiff caused a copy of the said summons and complaint in this case to be served upon Stephen Utter, Auditor and Recorder of Ada County, State of Idaho, at his office in the court house in Boise, Idaho. That the said Auditor and Recorder above named was not on the 8th day of February, 1937, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant, Manufacturers Trust Company, was not on the said 8th day of February, 1937, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Stephen Utter, as Auditor and Recorder of Ada County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

III.

That this Honorable Court, therefore, does not have jurisdiction of the defendant corporation, the Manufacturers Trust Company.

WHEREFORE, Hawley & Worthwine respectfully move that the purported summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 27th day of February, 1937.

Hawley & Worthwine

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendant Manufacturers Trust Company, a corporation, appearing specially.

(Duly verified)

Service by receipt of copy of the foregoing motion is hereby admitted this 27th day of Feb., 1927.

S. T. Schreiber,

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence: Boise, Idaho.

(Title of Court and Cause)

OBJECTION TO ALLOWANCE OF PETITION FOR REMOVAL

Filed in the State Court
March 3, 1937

TO THE HONORABLE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, JUDGE CHARLES F. KOELSCH, PRESIDING:

Comes now the plaintiff W. I. Phillips in the above entitled cause and objects to the removal of the said action to the District Court of the United States for the District of Idaho, Southern Division thereof, and for reasons therefore states:

I.

That said petition is not sufficient and does not state facts sufficient to warrant the Judge of this Court to grant the petition for removal.

II.

That the said bond as tendered by the defendants herein is not a valid and sufficient bond in law to protect the said Willim I. Phillips against cost and damages which may be awarded in the premises.

Dated March 3, 1937.

S. T. SCHREIBER,
Attorney for Plaintiff
William I. Phillips.

(Title of Court and Cause)

AFFIDAVIT IN OPPOSITION OF MOTION TO QUASH

Filed in the State Court

March 4, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

Ralph Shaffar being first duly sworn deposes and says that he is a resident of Idaho and living at Meridian in Ada County. That he in the month of September, 1934, with others went to the Linclon Mine in Gem County, Idaho, for the purpose of seeking employment and on that occasion saw three men working on said property and that he conversed with one Herb Marcum relative to employment. That at said time the men were sinking a vertical shaft east of the big shaft and hoisthouse on said property.

That subsequently again this affiant was on said property in July, 1936, and on that occasion saw two men working on and sinking same said shaft upon said property and they were taking out rock with a windlass, and further affiant saith not.

Ralph Shaffer.

SUBSCRIBED AND SWORN TO before me this 3rd day of March, 1937.

G. J. GARDNER,
(SEAL) Notary Public for Idaho,
Residing at Boise, Idaho.

My Commission expires: Nov. 22, 1937.

(Title of Court and Cause)

AFFIDAVIT

Filed in the State Court
March 4, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

William I. Phillips first being duly sworn deposes and says that I am W. I. Phillips who is the plaintiff in the above entitled cause against the Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants in said action.

That I am fully acquainted with all the facts pertaining to the matter set out in the plaintiff's complaint in said action and that said action was brought on the 8th day of February, 1937, against the defendants therein and that said defendants, both the corporation and Alexander Lewis, reside in the State of New York.

That the said Manufacturers Trust Company is a corporation organized under the laws of the State of New

York and is conducting a business in the State of Idaho under an assumed named, to wit: Alexander Lewis who is a resident of New York and not a resident of Idaho and has no interest in said property.

That said Manufacturers Trust Company has been for a period of several years and is still at this time engaged in doing business within the state as this affiant is informed and upon such information and belief alleges that the said Manufacturers Trust Company is conduting said Lincoln mining property and operating the same at the present time, and is buying eletric power and supplies and paying taxes, and paying wages to men employed, and is carrying insurance policies, all of which is being conducted in the name of Alexander Lewis who is by his own testimony not the owner of said property but that said business is being done through divers methods and divers people who are the agents of the said Manufacturers Trust Company as well, appears in the said petition of the applicant for removal.

And further affiant saith not.

William I. Phillips.

SUBSCRIBED AND SWORN to before me a Notary Public for the State of Idaho this 3rd days of March, 1937.

G. J. Gardner
(SEAL) Notary Public for Idaho,
Residence: Boise, Idaho.

(Title of Court and Cause)

AUTHORITY OF ATTORNEY TO SIGN BOND

Filed in State Court
March 4, 1937

Having authorized our Attorney, JESS HAWLEY, to sign a bond in the principal sum of FIVE HUNDRED DOLLARS ($500.00), and as required by the Statutes of the United States in connection with the removal of the above entitled cause to the District Court of the United States for the District of Idaho, Southern Division, prior to the filing of said bond, the defendant, Manufacturers Trust Company, a corporation, does hereby ratify and approve the action of said Jess Hawley in the signing and filing of said bond in the above entitled court and cause.

MANUFACTURERS TRUST COMPANY
(Corporate Seal) By James L. Fozard,
Vice-President.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

On this 2nd day of March, 1937, before me personally came JAMES L. FOZARD, to me known, who being by me duly sworn, did depose and say, that he resides at 52 Harrison Avenue, Roseland, New Jersey; that he is a Vice-President of MANUFACTURERS TRUST

COMPANY, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Nathan Borak,
NATHAN BORAK
Notary Public.

Bronx Co. Clk's No. 186 Reg. No. 171B37
New York Co. Clk's No. 1015 Reg. No. 7B588
Kings Co. Clerk's No. 120 Register No. 7477
Queens Co. Clk's No. 1815 Reg. No. 7026
(.....) Certificate filed in Westchester Co.
Commission expires March 30, 1937.

Form 2

No. 73227 Series D

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

I, ALBERT MARINELLI, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that

NATHAN BORAK

whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument

was at the time of taking the same a NOTARY PUBLIC acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Bronx with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 2 day of Mar., 1937.

(Court Seal) Albert Marinelli,
Clerk.

(Title of Court and Cause)

ORDER OF REMOVAL
Filed in State Court
March 4, 1937.
Filed in U. S. District Court
March 19, 1937.

The petition for removal in the above-entitled cause coming on regularly for hearing,

IT IS HEREBY ORDERED that the said cause shall be removed to the District Court of the United States for the District of Idaho, Southern Division, and the Clerk of the above entitled cause is hereby ordered to make necessary certification of the record.

DATED this 4th day of March, 1937.

CHAS. F. KOELSCH, District Judge.

(Title of Court and Cause)

March 4, 1937

CORRECTED MINUTES OF STATE COURT
No. 15448

In this cause the defendants having filed notice, motion to quash service on summons and complaint, and petition and bond for removal to the District Court of the United States for the District of Idaho, Southern Division, and the plaintiff having filed objections thereto supported by

affidavits, and the same being argued before the Court by counsel for the respective parties. Thereupon counsel for defendants agreed to file "authority of attorney" to sign Bond. Whereupon he did file the same in open Court.

Whereupon the Court ordered that the cause be removed to the District Court of the United States for the District of Idaho, Southern Division, and in open Court signed said order.

CHAS. F.KOELSCH,
District Judge.

CERTIFICATE

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, STEPHEN UTTER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original Complaint, Summons, Return on Summons, Service of Summons and Letter to Clerk of Gem County, Notice, Petition for Removal, Bond of Removal, Motion to Quash Service of Summons and Complaint, Objection to Allowance of Petition for Removal, Affidavit in Opposition of Motion to Quash, Affidavit, Authority of Attorney to Sign Bond and Order of Removal filed in the above entitled action and remaining now on file in my office at Boise City, Ada County, Idaho.

Given under my hand and the seal of said Court, at office in Boise City, Ada County, Idaho, this 18th day of March, 1937.

Stephen Utter,
(SEAL) Clerk.
By Otto F. Peterson,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

WILLIAM I. PHILLIPS,
Plaintiff,
vs.
MANUFACTURERS TRUST COMPANY, (a corporation), and ALEXANDER LEWIS,
Defendants.

MOTION TO REMAND
Filed March 30, 1937

TO THE HONORABLE C. C. CAVANAH, JUDGE OF THE ABOVE ENTITLED COURT:

Now comes the plaintiff and moves the Court to remand the above entitled cause to the STATE COURT from whence it was removed, for trial for the following reasons:

First: That the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said District Court of the United States.

Second: Because at the time attorneys for the defendants to-wit: February 27, 1937, filed appearance in said cause in the State Court and motion challenging the jurisdiction of said District Court thereby seeking to quash the service of summons and complaint, they waived the right of removal.

Third: Because all of the defendants in said action did not join in the petition for removal which was filed on February 27, 1937, and that but a single controversy, and not a separable one exists.

Fourth: And which petition was not accompanied by a good and sufficient and valid bond warranting the Court to transfer and remove the cause.

Fifth: That there was no acceptance or approval of said Bond.

Sixth: Because further that said action is in tort against a foreign corporation doing business in the State of Idaho which did not, and has not complied with the laws of the state relative to such corporations, and therefore, is properly suable in the Courts of this state in actions arising in tort within the state, and the diversity of citizenship in such instance is not pertinent, all of which facts are apparent from the record in this cause.

Seventh: That the said cause was prematurely re-

moved, particularly in this, to-wit, that said cause was ordered removed by, and was removed from said State Court to said Federal Court before service of summons upon said defendants therein, except upon the defendant Manufacturers Trust Company, and before the return of said summons of service to State Court, and without said Court having any evidence before it of said service on the other defendant.

WHEREFORE: Plaintiff avers that this Court has not jurisdiction to try and determine this cause, and prays that the same may be remanded to the Third Judicial District Court of the State of Idaho in and for Ada County from whence it came.

S. T. Schreiber,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Duly verified)

Received a copy and accept service of the above and foregoing motion this 30th day of March, 1937.

HAWLEY & WORTHWINE,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

AFFIDAVITS ON MOTION TO REMAND

Filed March 30, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, JAMES BAXTER, being first duly sworn on oath depose and say that I am President and General Manager of the Baxter Foundry and Machine Works, a corporation, of Boise, Idaho, located on South end of Capitol Boulevard in the City of Boise;

That in the month of May, 1933 one, B. Berthleson, an employee of the Lincoln Mines, came to the Foundry and conversed with the superintendent Firmin J. Arnould relative to the purchase of a quantity of mining equipment to be taken and used at the Lincoln Mines in Gem County, State of Idaho;

That Mr. Arnould and Mr. Berthleson after some considerable time selected a quantity of equipment to the value of $729.40 consisting of:

All Cast Iron Balls, for Grinding Ore.
Two Babbitted Motor Bearings.
Plunger Pump Rod and accessories.
Stock of Norway Iron.
Pump Casing.
Lot of Pipe.
Steel Split Pulleys.
Lot of Spring Steel.
Lot of Bolts and Nuts.
Three furnaces complete with smoke pipes.

Brass Pump Valve Castings.
Lot of Pipe Couplings, Packing and Conveyor Chain.
Air Receivers with Accessories.
Special Water Pulley.
Motor Base.
"Jim Crow" Rail Bender.
Lot of Belting, & Belt Bender.
Lot of Miscellaneous Supplies.
Filter Valve.
Steel Split Pulleys.
Special Split Cast Iron Pulley.
Lot of Mild and Curciform Drill Steel.
Lot of Hollow Drill Steel.

That the said Berthleson requested that the said equipment should be delivered immediately to the Lincoln Mines, that they were working, and the same was delivered to the Lincoln Mines and he further stated that this equipment is being purchased in the name of one Alexander Lewis, an employee of the Manufacturers Trust, a big Corporation in New York, and would be paid for, and further affiant saith not.

James Baxter.

Subscribed and sworn to before me this 25th day of March, 1937.

Truman Joiner,
(SEAL) Notary Public for Idaho,
Residing at Boise, Idaho.

My Commission expires Feb. 27, 1939.

(Title of Court and Cause)

AFFIDAVIT
On Motion to Remand
Filed March 30, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, FIRMIN J. ARNOULD, being first duly sworn on oath depose and say:

That I am Firmin J. Arnould the affiant herein, a resident of Boise, Ada County, Idaho;

That I am and have been employed as superintendent at the Baxter Foundry and Machine Works in Boise, Idaho and was so employed during the month of May, 1933 at which time one B. Berthleson, an employee in the Lincoln Mines in Gem County, Idaho, came to the foundry and ordered a quantity of mining equipment something over $700.00 worth for use at said property and at which time in discussing matters relative thereto, I asked him who was going to pay for this equipment and he stated that he acted for one Alexander Lewis who was an employee of the owner of the property, which was a large corporation in New York City—a banking corporation he called it—"The Manufacturers Trust and it had plenty of money to pay the bill and run the mines", and further affiant saith not.

Firmin J. Arnould.

Subscribed and sworn to before me this 25th day of March, 1937.

Truman Joiner,
(SEAL) Notary Public for Idaho,
Residing at Boise, Idaho.

My Commission expires Feb. 27th, 1939.

(Title of Court and Cause)

AFFIDAVIT
Filed March 30, 1937

STATE OF IDAHO)
COUNTY OF ADA) ss.

J. W. Crowe, being duly sworn on oath, deposes and says that he is the Division Manager of the Idaho Power Company, a Corporation, at Boise, Idaho; that he has full charge of the Division (J. H. C.) books and accounts of said Corporation in and at his office in the Division which consists of Boise, Emmett, Nampa, Caldwell, Meridian, Mountain Home, and Glenns Ferry and surrounding territory; that the Idaho Power Company carries and has carried the account of the Lincoln Mines for service rendered by said Company at Pearl, Idaho, in the name of one Alexander Lewis; that the service rendered is for electricity furnished by said Company at Pearl, Idaho, to the Lincoln Mine, and that said service has been continu-

ously rendered as aforesaid from July 21, 1933, until now, and at this time is being furnished. Further affiant sayeth not.

J. W. Crowe.

Subscribed and sworn to before me this 24th day of March, 1937.

M. E. Hughes,
Notary Public for Idaho,
Residing at Boise, Idaho.

(SEAL)

(Title of Court and Cause)

AFFIDAVIT OF SERVICE
Filed April 9, 1937

STATE OF IDAHO)
COUNTY OF GEM) ss.

I, Lilliam M. Campbell, Clerk of the District Court, Gem County, Idaho, do hereby certify that I received a post office registry return receipt signed Alexander Lewis in response to a registered letter under date of February 26, 1937, addressed by me to Mr. Alexander Lewis, c/o Manufacturers Trust Company, 55 Broad Street, New York City, New York, in which I enclosed a copy of summons and complaint in the case of William I. Phillips vs. Manufacturers Trust Company and Alexander Lewis served on me as Auditor of Gem County to be mailed to said Alexander Lewis.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of April, 1937.

Lillian M. Campbell,
(SEAL) Clerk of the District Court
Gem County, Idaho.

(COPY)

February 26, 1937

Mr. Alexander Lewis
c/o Manufacturers Trust Company
555 Broad Street
New York City, New York

Dear Sir:

Enclosed herewith summons and copy of complaint in the case of William I. Phillips vs. Manufacturers Trust Company, which was served on me as Auditor of Gem County and forwarded to you as required by statute. Your address having been given me today.

Very truly yours,

LMC:LL
Enc. 1
(Registered) Auditor.
Reg. # 1074 Emmett, Idaho sent Feb. 27 - 37
Co. Clerk to Alexander Lewis
N. Y., N. Y.
Return Receipt
Requested. J. W. Tyler
Fee Paid. Postmaster.
S.

(Title of Court and Cause)

AFFIDAVIT OF MOTION TO REMAND
Filed April 9, 1937

Truman Joiner, of Boise, County of Ada, and State of Idaho, being a duly qualified Certified Public Accountant within the State of Idaho, upon being duly sworn, deposes and makes the following statement having to do with a certain compensation insurance policy carried by one Alexander Lewis with the State Insurance Fund, an agency of the State of Idaho.

Affiant states that on the morning of April 6, 1937, affiant called upon Mr. P. C. O'Malley, manager of the State Insurance Fund, and requested general information as to compensation insurance, if any, carried upon workmen engaged at the Lincoln Mine in Gem County, Idaho, and requested that affiant be allowed to inspect such files and records as might be pertinent thereto. Request to inspect files and records was denied, but Mr. O'Malley did procure the files covering the matters mentioned, and, while referring to such files from time to time, did make substantially the following statements to affiant, namely:

> That one, Alexander Lewis, of 55 Broad Street, New York City, New York, carried State Insurance Fund policy No. 15,488 and that said Alexander Lewis has carried such policy continuously since

1931, except that insurance thereunder was suspended from March 12, 1932, to May 8, 1933, but that otherwise such policy was and has been continuously in effect from some time in 1931 until the present time and that the policy was in full force and effect on April 6, 1937. That said Workmen's Compensation policy No. 15,488 issued to Alexander Lewis covered workmen employed at the Lincoln Mine between Boise and Emmett and that the payroll as reported was in excess of $200.00 per month for most of the time said policy was in force.

Affiant further states that the statements as made by Mr. O'Malley were carefully recorded by affiant when and as they were made, and that Mr. O'Malley declined to give any information further than that stated above; and further affiant saith not.

Truman Joiner (SEAL)

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, Elmer W. Fox, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Truman Joiner, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day, in person, and acknowledge that he signed, sealed, and delivered the said instrument as his free and voluntary act and deed, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal, this 6th day of April, A. D., 1937.

Elmer W. Fox,
(SEAL) Notary Public.

(Title of Court and Cause)

MINUTES OF THE COURT OF APR. 14, 1937

This case came on for hearing on the Plaintiff's motion to remand the cause to the state court. S. T. Schreiber, Esquire, appeared as counsel for the plaintiff, the defendant's counsel not appearing.

The Court heard argument of the plaintiff's counsel on the motion, after which the court took the matter under advisement.

(Title of Court and Cause)

MINUTES OF THE COURT OF APR. 15, 1937

Upon application of the Manufacturers Trust Company one of the defendants and the National Surety Corporation for permission to file joint power of attorney of the National Surety Corporation in which F. G. Ensign, and George W. Walker, jointly or severally, of Boise, Idaho, are constituted and appointed true and lawful attorneys in fact of the said National Surety Corporation.

It is ordered that said permission is granted.

GENERAL POWER OF ATTORNEY

Filed April 14, 1937.

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N. Y., hath made, constituted and appointed, and does by these presents make, constitute and appoint F. G. Ensign and Geo. C. Walker, jointly or severally, of Boise and State of Idaho its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, acknowledge and deliver any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; provided, however, that the penal sum of any one such instrument executed hereunder shall not exceed TWO HUNDRED THOUSAND ($200,000.00) DOLLARS and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises. Said appointment is made under and by authority of the following provisions of the By-Laws of the NATIONAL SURETY CORPORATION:

"ARTICLE XII. RESIDENT OFFICERS AND ATTORNEYS-IN-FACT.

"Section 1. The President, Executive Vice President or any Vice President may, from time to time, appoint Resident Vice Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Corporation and the President, Executive Vice President or any Vice President, the Board of Directors or the Executive and Finance Committee may at any time suspend or revoke the powers and authority given to any such Resident Vice President, Resident Assistant Secretary or Attorney-in-Fact, and also remove any of them from office.

"Section 4. ATTORNEYS-IN-FACT. Attorneys-in-Fact may be given full power and authority, for and in the name and on behalf of the Corporation, to execute, acknowledge and deliver, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings, and any and all notices and documents cancelling or terminating the corporation's liability thereunder, and any such instrument so executed by any such Attorney-in-Fact shall be as binding upon the Corporation as if signed by the President and sealed and attested by the Secretary.

"Section 7. ATTORNEYS-IN-FACT. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, or other conditional or obligatory undertakings, and they are also authorized and empowered to certify to copies of the By-Laws of the corporation or any Article or Section thereof.

IN WITNESS WHEREOF, the NATIONAL SURETY CORPORATION has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 27th day of May, A. D., 1936.

NATIONAL SURETY CORPORATION

(SEAL) By E. M. Allen,

ATTEST: Rankin Martin, Vice President.

Assistant Secretary.

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.

On this 27th day of May, A. D., 1936, before me personally came E. M. Allen, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the NATIONAL SURETY CORPORATION, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order. And said E. M. Allen further said that he is acquainted with Rankin Martin and knows him to be the Assistant Secretary of said corporation; that the signature of the said Rankin Martin subscribed to said instrument attesting the seal hereunto affixed is in the genuine handwriting of the said Rankin Martin.

M. M. Miller,
Notary Public.

STATE OF NEW YORK,)
COUNTY OF NEW YORK) ss.

I. H. Hussenetter, Resident Assistant Secretary of the National SURETY CORPORATION, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said NATIONAL SURETY CORPORATION, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of New York, N. Y., this 10th day of April, A. D., 1937.

H. Hussenetter,
Resident Assistant Secretary.

(SEAL)

(Title of Court and Cause)

ORDER
Filed April 16, 1938

The petition for removal and motion to remand having been presented and after consideration of the same it is ORDERED that the motion of the plaintiff to remand is denied.

Exception allowed.

Dated April 16th, 1937.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

EXCEPTIONS TO RULING OF THE COURT
Filed April 22,1937

Be it remembered that on this day, to-wit: April 14, 1937, came on to be heard the plaintiff's motion to remand, number 1971, to the State Court from whence it was removed, and the court having heard the motion and argument of counsel, thereon, and having considered the same, said motion was by said Court in all things overruled and held for naught, to which ruling of the court plaintiff excepted, and here tenders his Bill of Exceptions asking that the same be approved and made a part of the record, which is accordingly done.

CHARLES C. CAVANAH,
District Judge of the above entitled court.

Dated this 22nd day of April, 1937.

(Title of Court and Cause)

NOTICE, AND RENEWAL OF MOTION TO REMAND.
Filed April 27, 1937

TO HAWLEY & WORTHWINE, ATTORNEYS FOR DEFENDANTS:

PLEASE TAKE NOTICE, that the plaintiff William I. Phillips will on the fourth day of May, 1937, at the hour of 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard at the United States Court House in Boise, Idaho, apply for an order remanding the above entitled cause to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, from which court it was removed.

There is herewith served upon you a copy of the motion which will be presented to the court at the time aforesaid, and a copy of the affidavit in support of said motion.

S. T. SCHREIBER,
Attorney for Plaintiff.
Residence, Boise, Idaho.

Received copy and accept service of the foregoing notice accompanied by affidavit and the motion therein referred to.

Hawley and Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

RENEWAL OF MOTION TO REMAND TO STATE COURT.

Filed April 27, 1937

TO THE ABOVE ENTITLED COURT, THE HONORABLE JUDGE CHARLES C. CAVANAH, PRESIDING:

And now comes the plaintiff and moves the court to remand the above entitled cause to the state court from whence it was removed for trial for the following reasons:

FIRST: Because both defendants in the above entitled action were not joined and did not join in the removal petition.

SECOND: That since the removal of said cause to the District Court of the United States on March 19, 1937, more than 30 days have elapsed and no pleadings, answer, or demurrer, to the declaration or complaint of the plaintiff having being filed by the defendants as provided by statute, Judicial Code, Section 29, (Compiled Statute) Section 1011, and as amended); therefore removal has not been properly made nor completed and this court has no jurisdiction other than to remand said cause to the state court of the Third Judicial District in and for Ada County, from whence it was removed, and that said matter is mandatory.

WHEREFORE, plaintiff says this court has not jurisdiction to try and determine this case, and prays that the

same may be remanded to the Third Judicial District Court of the State of Idaho, from whence it came.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Duly verified)

(Title of Court and Cause)

AFFIDAVIT ON MOTION TO SET ASIDE ORDER AND REMAND CAUSE.

Filed April 27, 1937

UNITED STATES OF AMERICA,)
for the District of Idaho,) ss.
Southern Division,)
County of Ada.)

I am, and was at all the times herein mentioned, Attorney for plaintiff in the above entitled cause. That said cause was brought in the District Court of the Third Judicial District of the State of Idaho in Ada County at Boise, on February 8, 1937, after which the same was removed to the Federal Court and District aforesaid on motion of defendant, and filed and recorded on March 19, 1937, in said court by defendant, Manufacturers Trust Company, a corporation, before return

of service on Alexander Lewis, joint defendant, was had. The matter in dispute is not a separable controversy, but is a joint tort, and that the defendant Alexander Lewis did not join in said removal petition. That subsequently service was completed on said Lewis and on April 14, 1937, motion to remand said cause to the State Court was presented by counsel for plaintiff and the court taking the same under advisement did, on April 16 over rule said motion in all things, and held the same for naught and to which ruling the plaintiff excepted.

That no affidavit of merits of defense was ever filed by defendants and that no pleadings, answer, or demurrer has ever been filed since the removal to the aforesaid court and the time for pleading having now long since expired and no valid excuse or any excuse offered therefore. Affiant avers and verily believes that the defendants are wilfully delaying said cause and have not a good and sufficient and meritorius defense on the merits to the cause of action set up in plaintiff's complaint, but are seeking to delay and wilfully procrastinate the final determination thereof. That this court should by reason of the record and the law in such case provided in justice remand the said cause to the state court. And further affiant saith not.

S. T. Schreiber.

Subscribed and sworn to before, Clerk of District Court, Ada County in and for the State of Idaho, this 27th day of April, 1937.

(SEAL) Stephen Utter, Clerk,
Residing at Boise, Idaho.
By B. Clyde Eagleson,
Deputy Clerk.

(Title of Court and Cause)

MINUTES OF THE COURT OF MAY 4, 1937.

The plaintiff's renewed motion to remand the cause to the State Court was presented by his counsel S. T. Schreiber, Esquire, and said motion was argued before the Court by counsel for the respective parties.

The Court denied the renewed motion to remand.

(Title of Court and Cause)

BILL OF EXCEPTIONS
Filed May 10,1937

Be it remembered that on this fourth day of May, 1937, came on to be heard the plaintiff's Renewal Motion to remand the above entitled and numbered cause 1971, to the State Court from whence it was removed, and the court having heard the motion and argument of counsel for plaintiff thereon, and the argument of counsel for defendants opposed thereto as well, and having

considered the same, said motion was by the said court in all things overruled and held for naught, to which ruling of the court plaintiff excepted and here tenders his bill of exceptions, asking that same be approved and made a part of the record, which is accordingly done.

May 10th, 1937.

Charles C. Cavanah,
Judge of said entitled court.

(Title of Court and Cause)

PRAECIPE FOR DEFAULT

Filed June 2, 1937

To W. B. McREYNOLDS, Clerk for the District Court of the Ninth District of Idaho, Southern Division:

You will please enter the default of the defendants herein for want of answer or defense in the above entitled cause.

S. T. Schreiber,
Attorney for Plaintiff,
Residing at Boise, Idaho.

DATED this 2nd day of June, 1937.

(Title of Court and Cause)

DEFAULT

Filed June 2, 1937

IN THIS ACTION, The defendant MANUFACTURERS TRUST COMPANY, a corporation, and the defendant ALEXANDER LEWIS having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, and the time allowed by law for answering having expired, the default of the said defendant MANUFACTURERS TRUST COMPANY (a corporation) and the defendant, ALEXANDER LEWIS in the premises is hereby duly entered according to law.

Witness my hand and the seal of said Court this 2nd day of June, 1937.

W. D. McReynolds
Clerk

(SEAL) By Lona Manser,
Deputy Clerk

(Title of Court and Cause)

MOTION TO MAKE DEFAULT JUDGMENT FINAL

Filed July 6, 1937

COMES NOW The plaintiff, William I. Phillips, in the above entitled Court and cause, and moves the Court that the default entered on June 2, 1937 be made final,

and that the cause be set down for hearing, examination, and determination of the amount justly to be fixed as the damages due to and sustained by plaintiff and to render judgment therefore final against defendants.

Dated this 6th day of July, 1937.

S. T. Schreiber
Attorney for Plaintiff
Residing at Boise, Idaho

(Title of Court and Cause)

MOTION TO SET ASIDE DEFAULT

Filed August 6, 1937

COMES NOW, the defendant, Manufacturers Trust Company, a corporation, by its attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of setting aside the default of the said defendant entered in the above entitled court, and not generally or for any other purpose whatsoever, and does respectfully show the court:

I.

That the Manufacturere Trust Company is a corporation created, organized and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York, and that the said corporation is not now or at any other time has not been doing business in the State of Idaho.

II.

That upon the 27th day of February, 1937, this specially appearing defendant filed in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, its petition and bond for a removal of the above entitled cause from said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, to the District Court of the United States, for the District of Idaho, Southern Division, and at the time of filing said petition and bond for removal filed in the said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, its motion to quash the attempted service upon this defendant of summons and complaint. That upon the 4th day of March, 1937, the said District Court of the Third Judicial District of the State of Idaho, in and for Ada County, made and entered its order removing the above entitled cause from said State Court to this court, and that thereafter and within the time allowed by law a duly certified transcript prepared in accordance with law was filed in the above entitled court, and that in said transcript there appeared and was said motion by this specially appearing defendant, Manufacturers Trust Company, a corporation, to quash the service of summons and complaint. That said motion to quash the service of summons and complaint has never been submitted to this court for consideration or decision and the same is now pending in this court undisposed of.

III.

That on the 2nd day of June, 1937, the plaintiff herein applied to the Clerk of the above entitled court to have a clerk's default entered against the said defendant, Manufacturers Trust Company, a corporation, and on the 2nd day of June, 1937, the said Clerk acting by and through a deputy entered the default of the defendant, notwithstanding the fact that the said cause was pending upon the motion of the defendant, Manufacturers Trust Company, to quash the service of summons and complaint.

IV.

That the said default so entered on the 2nd day of June, 1937, was entered without authority of law, and during the time that there was a special appearance by this defendant for the purpose of having the service of summons and complaint quashed.

V.

That this honorable court has never acquired jurisdiction of this specially appearing defendant as appears from the motion to quash service of summons and complaint on file herein.

WHEREFORE, Hawley & Worthwine respectfully move that the default entered by the Clerk of this Court on the 2nd day of June, 1937, be set aside, annulled and vacated.

This motion is based upon the records and files in this action, including this motion.

Dated this 4th day of August, 1937.

Jess Hawley
Oscar Worthwine
HAWLEY & WORTHWINE
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company

(Duly verified)

RETURN ON SERVICE OF WRIT

United States of America,)
..... District of Idaho) ss:

I hereby certify and return that I served the annexed MOTION TO SET ASIDE DEFAULT on the therein-named WILLIAM I. PHILLIPS.....

.....

.....

.....

by handing to and leaving a true and correct copy thereof with Attorney for Plaintiff, S. T. Schreiber, (Who refused to sign receipt accepting service of copy)..... personally at Boise, Idaho in said District on the 5th day of August, A. D. 1937.

George A. Meffan
U. S. Marshal.
By Julia McCarter
Deputy.

(Title of Court and Cause)

MOTION TO SET ASIDE DEFAULT

Filed August 6, 1937

COMES NOW, the defendant above named, Alexander Lewis, by his attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of having the court set aside the default heretofore entered and the alleged service upon Alexander Lewis quashed, on the ground that the court was without jurisdiction to enter the said default, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That the above entitled cause was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on the 8th day of February, 1937.

II.

That thereafter the defendant, Manufacturers Trust Company, a corporation, filed in said District Court its petition and bond for removal and on the 4th day of March, 1937, an order of removal was duly made and entered in said District Court in the above entitled cause, and thereafter and on the 19th day of March, 1937, a

transcript of the usual and proper papers on removal was filed in this court.

III.

That service of summons and complaint in this case was never made upon the said defendant, Alexander Lewis, by personal service or otherwise, but that on or about the 27th day of February, 1937, the plaintiff caused Lillian Campbell, the Auditor of Gem County, State of Idaho, as Auditor to register to the defendant, Alexander Lewis, a summons and a copy of the complaint to the said Alexander Lewis. That at no time since the institution of said suit in said state court has said Alexander Lewis been a resident of, or present in the State of Idaho, but has been a resident of the City of New York in the State of New York, and at all times has been absent from the State of Idaho and in the State of New York. That the only evidence of record in this cause of any attempted service upon Alexander Lewis is that on or about the 27th day of February, 1937, Lillian Campbell as Auditor of Gem County, State of Idaho, registered a copy of said summons and complaint to the said Alexander Lewis.

IV.

That on the 2nd day of June, 1937, the plaintiff herein caused the Clerk of this court to enter the default of the said Alexander Lewis. That the said default was wrongfully entered and entered without authority of law for the reason that no due, legal or any service of the summons or complaint was ever had upon Alexander Lewis,

and there is nothing in the record in this case upon which to base the entry of the default, in that:

1. There is no evidence in the record of personal service or any other service upon Alexander Lewis in the State of Idaho or in the District of Idaho.

2. There is no evidence in the record of service, personal or otherwise, upon the defendant, Alexander Lewis, outside the State of Idaho.

3. That the record affirmatively shows that Alexander Lewis was not a resident of or in the State of Idaho at any time since the filing of said action in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, and on the contrary the evidence and record shows that he was a resident of and in the State of New York at all the times since the filing of said action.

4. That there is no evidence in the record of an affidavit having been filed with the Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, in the above entitled cause, or at all, as required by Section 5-508 of the Idaho Code Annotated, 1932 Official Edition.

5. That no affidavit was filed with the Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, showing that the defendant, Alexander Lewis, resided out of the State of Idaho and could not be served within the State of Idaho,

and could not after due diligence be found within the State of Idaho, or concealed himself therein to avoid service of summons, or that he was a necessary and proper party to the action, or that a cause of action existed against the said defendant.

6. That no order was made by the Clerk of the District Court of the Third Judicial District of the State of Idaho in and for Ada County, as required by Section 5-508 of the Idaho Code Annotated, 1932 Official Edition, for publication of summons or for personal service of summons outside the State of Idaho in lieu of such publication.

7. That no order was entered in the above entitled cause by the Clerk or the Judge of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, directing the publication of summons to be made in a newspaper, nor was a newspaper designated to be the most likely to give notice to the defendant, nor was any order issued directing the publication of summons at least once a week for a full period of four weeks, at least twenty-six days intervening between the first and last publication of summons, nor was any order entered in said cause directing that a copy of summons and complaint be deposited within ten days in a post office directed to the person to be served at his last known address, all of which were required by Section 5-509 of the Idaho Code Annotated, 1932 Official Edition.

8. That there is no evidence in this record of per-

sonal service of summons upon the defendant, Alexander Lewis, by any sheriff, or an affidavit of any one else, or an affidavit of the printer, or an affidavit showing the deposit of a copy of the summons or complaint in the post office, or any affidavit of personal service outside of the state, or the written admission of service of the defendant.

9. That no service, personal or otherwise, of summons and complaint has been had upon the defendant, Alexander Lewis, other than the mailing of summons and complaint by Lillian Campbell, Auditor of Gem County, State of Idaho.

V.

That this honorable court did not have jurisdiction of the defendant, Alexander Lewis, at the time said default was entered, or at all.

VI.

That there is and was no evidence of record in this cause that any effort or attempt was made to serve the defendant, Alexander Lewis, with the process issuing out of this court, nor was any effort or attempt made to secure jurisdiction of said defendant, Alexander Lewis, in accordance with the statutes and rules of any federal court.

WHEREFORE, Hawley & Worthwine respectfully move that the default heretofore entered against the defendant, Alexander Lewis, be set aside, cancelled and

held for naught, and that the attempted service of summons on Alexander Lewis by mail by Lillian Campbell be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 4th day of August, 1937.

Jess Hawley
Oscar Worthwine
HAWLEY & WORTHWINE
Residence: Boise, Idaho
Appearing specially for
Defendant, Alexander Lewis.

(Duly verified)

RETURN ON SERVICE OF WRIT

United States of America,)
..... District of Idaho)ss:

I hereby certify and return that I served the annexed MOTION TO SET ASIDE DEFAULT.....

.....on the therein-named William I. Phillips

.....

.....

.....

by handing to and leaving a true and correct copy thereof with Attorney for Plaintiff, S. T. Schreiber, (who refused to sign receipt accepting service of copy personal-

ly at Boise, Idaho in said District on the 5th day of August, A. D. 1937.

George A. Meffan
U. S. Marshal.

By Julia McCarter
Deputy.

(Title of Court and Cause)

MINUTES OF THE COURT OF SEP. 13, 1937

The motions of the defendants Manufactureres Trust Company and Alexander Lewis to set aside defaults heretofore entered against said defendants came on for hearing before the Court.

The motions were argued by O. W. Worthwine, Esquire, on the part of the defendants and S. T. Schreiber, Esquire, on the part of the plaintiff.

The matters were taken under advisement. The plaintiff was granted six days in which to file brief and the defendant the ten days following.

(Title of Court and Cause)

MINUTES OF THE COURT OF SEP. 30, 1937

The motions of the defendants to vacate and set aside the orders of defaults were further argued before the Court by counsel for the respective parties. The Court announced that he considered the sufficiency of the service submitted, together with the motion to vacate default and took the matters under advisement.

(Title of Court and Cause)

ORDER

Filed October 5, 1937

The motions of the defendants having been presented and argued by counsel, and after consideration of the same it is Ordered as follows:

1. That the motions of the defendants to vacate and set aside the default of the defendants entered by the Clerk of this Court are sustained.

2. That the motions of the defendants to quash the service of summons and complaint are sustained.

Dated October 5, 1937.

CHARLES C. CAVANAH
District Judge

(Title of Court and Cause)

OPINION

Filed October 5, 1937

S. T. Schreiber, Attorney for the Plaintiff,
Boise, Idaho.

Hawley & Worthwine, Attorneys for the defendants,
Boise, Idaho.

October 5th, 1937

CAVANAH, District Judge

This action was removed to this Court from the State District Court and the motion of the plaintiff to remand was denied; thereafter on June 2, 1937, plaintiff filed praecipe for default of the defendants, which was entered by the Clerk and thereafter on July 6, 1937, moved that it be made final and the cause be set down for hearing.

On August 6, 1937 defendants filed separate motions to set aside default which present separate questions, namely:

1. In the motion of the defendant Manufacturers Trust Company it urges that at the time it filed its petition and bond on February 27, 1937, for removal of the cause to this Court it also filed motion to quash the attempted service of summons and complaint, upon it, which was not considered and determined by the State Court as the order removing the cause to this Court on March 4, 1937 was entered, and

2. That the default was entered by the Clerk of this

Court was without authority of law as there was pending a special appearence of the defendant to have the service quashed.

3. That the attempted service of Summons and Complaint upon the defendant Manufacturers Trust Company was not made in compliance with the laws of the State.

The motion of the defendant Alexander Lewis to set aside default urges:

1. That personal service of summons and complaint was never made upon him as the only evidence of record of any attempted service upon him is that on or about February 27, 1937, Lillian Campbell, as Auditor of Gem County, Idaho, registered copy of the summons and complaint to him and he asserts that the entry of the default was without authority of law in that; (a) That the record affirmatively shows that he was not at the time of filing the action and since, a resident of the State of Idaho, but a resident of the State of New York and that no affidavit was filed with the Clerk of the State Court showing that he resided out of the State of Idaho and could not be served within the State of Idaho, and could not, after due diligence be found within the State of Idaho, or concealed himself therein to avoid service or that he was a necessary party to the action, or that a cause of action existed against him, nor were orders made for the publication of summons or personal service of summons outside of the State of Idaho, in lieu of pub-

lication, being the steps required to be taken by Sections 5-507 to 5-509 I. C. A. inclusive, nor were there any efforts made to serve him with process issuing out of this Court.

Referring first to the motion of the defendant Manufacturers Trust Company, it appears that at the time of filing the removal papers, it had filed also a special appearance of the motion to quash service which has never been disposed of by either the State Court or this Court, and is still pending. The State Court made no order on ruling on the motion to quash. The mere fact that the State Court entertained the order of removal, it did not by so doing decide the motion of the defendant, Manufacturers Trust Company to quash the service, for under the Federal Statute and decisions of the Federal Courts it could not pass upon any question pending after the petition for removal and bond were filed, for the moment they were filed that Court had no further power or authority to consider the case, other than to sign the order of removal. Even should the State Court have decided, after the petition and bond to remove was filed, the motion to qush, such action would have been in contravention to the Federal Statute, as the Statute provides that when a petition and bond for removal are filed in the State Court it shall then be the duty of the State Court to accept the petition and bond and proceed no further in the suit, Title 28, Section 72 U. S. C. A. Mannington v. Hocking Valley Ry. Co., 183 Fed. 133.

At the time petition and bond for removal were filed

the Manufacturers Trust Company had also filed its special appearance of the motion to quash service of summons and complaint, which prevents a default being taken and the cause is transferred to this Court as it stood in the State Court.

This conclusion is reached by the Supreme Court of the United States when in interpreting the removal statute in the case of Cain v. Commercial Publishing Company, 232 U. S. 124, where it is said: "The weakness of plaintiff's contention is demonstrated not only when we consider all of the language of Section 29, but the language of Section 38, which provides that in all suits removed the district court shall proceed therein as if the suit had been originally commenced in the district court, 'and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal'. In other words, the cause is transferred to the district court as it stands in the state court and the defendant is enabled to avail himself in the latter court of any defenses, and, within the time designated, plead to the action 'in the same manner as if it had been originally commenced in said district court.' And these words, we have seen, were explicitly given such effect in the cited cases." Carvey v. Compania Metaulergica Merricana, 222 Fed. 732; Higgins et al. v. California Prune and Apricot Growers, 299 Fed. 810.

The interpretation of the removal statute is clearly stated in the Encyclopedia of Federal Procedure, Vol. 2,

page 211, as follows: "It is clear that the transfer of the suit to a United States court does not vacate what has been done in the State Court. The cause goes to the Federal Court laden with whatever proceedings have properly attached thereto before the transfer and the Federal Court will so far as possible recognize and give effect to them. It will so far as possible respect the process and notices in the State Court, such as a notice of intention to suffer a default or a notice of a motion to make the complaint more definite and certain. The Federal Court will proceed with the hearing of motions made in the State Court but undisposed of at the time of the removal, such as motions to dismiss, to quash or set aside process or service, to make the pleadings more definite and certain, or to resettle the form of an order on affirmance."

Obviously from what has been said as to the motion of the defendant Manufacturers Trust Company to set aside the default and to quash service of summons and complaint which is still pending, the default entered by the Clerk of this Court was without authority of law as that defendant was not in default and the same must be set aside, and the motion to quash the service is to be disposed of by this Court, and after considering the record and the provisions of the Statute of the State above referred to as to what steps are required to perfect service of summons and complaint, it is clear that the motion to quash the service of summons and com-

plaint attempted to be made upon the defendant Manufacturers Trust Company should be sustained.

Referring second to the motion of Alexander Lewis to set aside the default it is apparent from the record that the pretended service upon him was not made in the manner as required by the above provisions of the statute of the State which are applicable in making service in the present case.

This action is a personal one and the Court cannot acquire jurisdiction over the person of Alexander Lewis unless service is made upon him in the manner provided by law, as he is a resident of the State of New York, and therefore, the default so entered by the Clerk against him will be set aside.

Accordingly orders will be entered to meet the conclusions here reached.

(Title of Court and Cause)

MINUTES OF THE COURT OF OCT. 5, 1937.

Upon application of plaintiff's counsel the plaintiff was granted exceptions to the Court's order of this date, vacating and setting aside order of default, and quashing service of summons.

The plaintiff was granted twenty days in which to prepare and file proposed bill of exceptions.

(Title of Court and Cause)

BILL OF EXCEPTIONS

Filed October 20, 1937

Be it remembered at the September Term of this Court at Boise, Idaho, 1937, the Honorable Charles C. *Cavanaugh,* Judge of this said Court, presiding, the above entitled cause came on to be heard and the following proceedings were had, to-wit:

The motion of the Plaintiff to make the default judgment final, and the motion of the Defendants to set aside the default so entered by the Plaintiff, and to quash the service originally made in said action, came on for hearing, and argument of counsel for Plaintiff thereon and the argument of counsel for defendant opposed thereto as well, having been heard and considered, the Court denied the motion of the Plaintiff, and the motions of the Defendants to vacate and set aside the default entered by the Clerk of this Court were sustained; and secondly, the motions of the Defendants to quash service of summons and complaint were sustained, to which rulings in all things—counsel for plaintiff then and there duly reserved exceptions.

Inasmuch as the rulings and exceptions specified are requested to appear in a bill of exceptions in the record of said cause, I, Charles C. Cavanah, Judge of said

Court, who presided at the trial thereof, after due notice given by a copy delivered to the Defendants herein, have settled and signed the said bill, and have ordered that the same be made a part of the record of said cause this 20th day of October, 1937.

Charles C. Cavanah,
Judge.

Received and accept service of the above and foregoing bill of exceptions.

Hawley & Worthwine,
Attorneys for Defendants, appearing specially for said defendants and not generally and for the sole purpose of quashing service of summons and having defaults set aside.

(Title of Court and Cause)

NOTICE OF MOTION TO RECONSIDER ORDER OVERRULING MOTION TO REMAND.

Filed October 21, 1937

TO HAWLEY AND WORTHWINE, ATTORNEYS FOR DEFENDANTS:

Please take notice that the Plaintiff, William I. Phillips, will, on the 8th day of November, 1937, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard in the United States

Courthouse at Boise, Idaho, move the Court to reconsider order overruling the motion to remand the above entitled cause to the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, from which it was removed.

There is herewith served upon you a copy of the motion which will be presented to the Court at the time aforesaid, which said motion is to be considered as supported by the affidavit heretofore filed in the case of date April 27, 1937.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

Received copy and accept service of the foregoing notice and the motion therein referred to.

Hawley & Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

MOTION TO RECONSIDER ORDER OVERRULING MOTION TO REMAND.

Filed October 21, 1937.

TO THE ABOVE ENTITLED COURT, THE HONORABLE CHARLES C. *CAVANAUGH*, PRESIDING:

Comes now the Plaintiff and respectfully moves the

Court for reconsideration of its order overruling Plaintiff's motion to remand said cause to the State Court on the grounds assigned as error:

1. That the Court is in error in overruling the motion heretofore presented, wherein its jurisdiction to try and determine this case was challenged.

2. The Court is in error in holding a present right of appeal from such order exists, and basing his order in part on such position.

3. The Court is in error in not considering and passing on the question of the defendant corporation, The Manufacturers' Trust Company, doing business in the State of Idaho.

4. And the Court is in error in holding inferentially that the action is a separable controversy.

5. And the Court erred in holding that the service in the State Court was not sufficient according to statute, and erred in quashing the same against both defendants.

WHEREFORE: Plaintiff avers that the Court has not jurisdiction to try and determine this cause and prays that its former order may be overruled, and that the cause be remanded to the Third Judicial District Court of the State of Idaho from which it came.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Duly verified)

Received a copy and accept service of the above and foregoing motion this 21 day of October, 1937.

Hawley & Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

(Title of Court and Cause)

AFFIDAVIT IN SUPPORT OF MOTION TO RECONSIDER ORDERS OVER-RULING MOTIONS TO REMAND.
Filed January 3, 1938.

AFFIDAVIT OF ROBERT W. CLARK.

UNITED STATES OF AMERICA)
For the District of Idaho) ss.
Southern Division, ADA COUNTY.)

I, Robert W. Clark, of Boise, Ada County, Idaho, depose and say that I am Robert W. Clark who is the affiant herein; that I am forty years of age, a married man, and have a family and reside at 1302 North 21st Street, Boise City, that I am a truck driver and am so engaged in trucking, and have been for a number of years so engaged, and

am employed by the Stunz Lumber Company of Horse Shoe Bend, Idaho.

That on about the 15th day of June, 1937, one Fred Turner, superintendent of the Lincoln Mine, came to the office of the Stunz Lumber Company at Horse Shoe Bend and ordered lumber to be delivered at the Lincoln Mine at Pearl, Idaho, of the following dimensions: June 16, 1937, he ordered, and I delivered 2,939 feet of dimension lumber as follows: 6 x 6s, 16 feet long; 2 x 6s, 16 feet long; 1 x 12s, 16 feet long; and 2 x 4s, 16 feet long; that again on August 21, 1937, Mr. Turner ordered, and I delivered to the Lincoln Mine 3,700 feet of the following dimensions: 6 x6s, 16 feet; 2 x 6s, 16 feet; 1 x 12s, 16 feet; and 2 x 4s, 16 feet; that on December 5, 1937, Mr. Turner ordered for the Lincoln Mine and I delivered the same at Pearl, Idaho, 3,300 feet of the following dimensions: 6 x 6s, 16 feet; 2 x 6s, 16 feet; 1 x 12s, 16 feet; and 2 x 4s, 16 feet; the 6 x 6s, 16 feet and the 2 x 4s, 16 feet were red fir. The 1 x 12s, 16 feet were pine. In 1936 I also delivered two loads of about 3,300 each of 6 x 6s, 16 feet; 2 x 6s 16 feet; 1 x 12s, 14 feet; and 2 x 4s, 16 feet, but I do not remember the specific date that I delivered these two loads. All of the lumber was bought by Mr. Turner and he paid for it so we do not have the invoices. Mr. Turner informed me that he wanted some for "duck boards" and the 1 x 12s in the mine and the 2 x 4s for "collar braces" in the mine. The payments Mr. Turner made aggregated between seventy and eighty dollars for each load, and he informed me that

he wanted the lumber immediately as he had a man or two working with him.

I delivered the first load to the Luella shaft where they were working at the time. Mr. Turner gave me another order for about 8,000 feet of 2 x 4s and 6 x 6s, and when I delivered the first order Turner said, "I do not want any more, they may sell out, but I'll take this load anyway. If they sell the mine I'll be out of a job." He meant by "they", as nearly as I could learn and understand, the Manufacturers Trust Company. There were several families living at the mine at the time I was delivering the lumber. And further affiant sayeth not.

ROBERT W. CLARK.

Subscribed and sworn to before me, a Notary Public for Idaho, this 31st day of December, 1937.

JAMES S. BOGART,
(Seal) Notary Public,
Residing at Boise, Idaho.

Received copy of foregoing affidavit.

JESS HAWLEY,
Attorney for Defendants.

OSCAR W. WORTHWINE,
Attorney for Defendants.

(Title of Court and Cause)

MINUTES OF THE COURT OF JANUARY 5, 1938

The plaintiff's motion for reconsideration of the order overruling the plaintiff's motion to remand the case to the State Court came on for hearing before the Court with counsel for the respective parties.

The defendant's counsel moved the Court to deny the plaintiff's motion. After hearing respective counsel, the Court denied the application for reconsideration, and granted the plaintiff exceptions to the order.

(Title of Court and Cause)

EXCEPTIONS TO RULINGS.

Filed January 7, 1938.

BE IT REMEMBERED that on this day, TO-WIT:

January 5, 1938, came on to be heard the plaintiff's "Motion to reconsider order over-ruling motion to Remand" the above entitled action #1971, to the State Court from whence it was removed, and the Court having bade Counsel, Attorney for Plaintiff to proceed with argument thereon, and as attorney for plaintiff was reading his motion and stating his propositions of law, Attorney for defendants arose and objected to the consideration thereof, and at the suggestion of the Court offered a motion stating that the Court had already passed upon the Questions to be presented by the Attorney for plaintiff, in his motion, and the Court then and there ruled and sustained

the motion and objections of defendants, and plaintiff was thereby unable to present his case, to which rulings of the Court in all things plaintiff then and there excepted, and hereby tenders his Bill of Exceptions, requesting that same be made a part of the record, because none of said matters otherwise appear, and it is prayed that these his exceptions be signed, allowed, and approved, and made a part of the record pursuant to rules, and practice in such case made and provided; and is accordingly done.

CHARLES C. CAVANAH,
District Judge.

Dated this 7th day of January, 1938.

(Title of Court and Cause)

ANOTHER SUMMONS
Filed February 7, 1938

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the above-named Defendants:

You are hereby notified that a complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above-named plaintiff, and you are hereby directed to appear and plead to the said complaint within twenty days of the service of this summons; and you are further notified that unless you so appear and plead to said complaint

within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint, a copy of which is attached hereto, served herewith, and made a part hereof.

And this is to command you, the Marshal of said District, or your deputy, to make due service and return of this Summons. Hereof fail not.

WITNESS, The Honorable CHARLES C. CAVANAH, Judge of the District Court of the United States, and the seal of said Court affixed at Boise, in said District, this 5th day of February, 1938.

(SEAL) W. D. McReynolds, Clerk.

S. T. Schreiber,
Attorney for Plaintiff,
Residence: Boise, Ida.

Boise, Idaho
February 5, 1938

United States of America,)
District of Idaho) ss.

I hereby certify and return that I received the annexed Summons on the 5th day of February, 1938, and I further certify that I personally served the same on the 5th day of February, 1938 on the Manufacturers Trust Company, a corporation, one of the defendants named in said summons by delivering to and leaving with Lillian M. Campbell, County Auditor of Gem County, Idaho, personally at Emmett, County of Gem, State of Idaho, a

copy of said summons, together with a copy of the complaint in said action attached to said copy of summons. The defendant, Manufacturers Trust Company, a corporation, is a foreign corporation and does not have a designated person or agent actually residing in Idaho upon whom process can be served and the Secretary of State of the State of Idaho states that the said defendant, Manufacturers Trust Company, has not filed designation of agent in his office.

I further certify that after due and diligent search I am unable to locate Alexander Lewis, one of the defendants named in said summons within the District of Idaho.

I further certify that later I mailed copy of summons, with copy of complaint attached, to Lillian M. Campbell, Auditor and Recorder of Gem County, to be mailed to Alexander Lewis, at 45 Broad Street, New York City, N. Y.

GEORGE A. MEFFAN,
U. S. Marshal.

By JULIA McCARTER,
Deputy.

(Title of Court and Cause)

ANOTHER SUMMONS

Filed February 8, 1938

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the above-named Defendants:

You are hereby notified that a complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above-named plaintiff, and you are hereby directed to appear and plead to the said complaint within twenty days of the service of this summons; and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said complaint, a copy of which is attached hereto, served herewith, and made a part hereof.

And this is to command you, the Marshal of said District, or your deputy, to make due service and return of this Summons. Hereof fail not.

WITNESS, The Honorable CHARLES C. CAVANAH, Judge of the District Court of the United States, and the seal of said Court affixed at Boise, in said District, this 8th day of February, 1938.

(SEAL) W. D. McREYNOLDS, Clerk.

Lona Manser, Deputy Clerk.

Attorney for Plaintiff:
S. T. SCHREIBER,
Residence, Boise, Idaho.

United States of America) ss.
District of Idaho)

I hereby certify and return that I received the annexed summons in the case of William I. Phillips, Plaintiff vs. Manufacturers Trust Company, a corporation, and Alexander Lewis, Defendants, on the 8th day of February, 1938, and after diligent search I am unable to find any managing or business agent, cashier, secretary, or officer, or any station, or ticket agent of said corporation or designated person in the county where the action is commenced within the State and District of Idaho upon whom service may be made.

I further certify that the said Manufacturers Trust Company, a corporation, is a foreign corporation and has not complied with the constitution and laws so made and provided relative to foreign corporations doing business in the State of Idaho; that the said corporation is conducting a mining business in Gem County, State of Idaho, and does not have any managing or business agent, cashier, secretary, or officer, or any station, or ticket agent, or designated person, within the said Gem County where doing business, upon whom service can be made.

I further certify that the Defendant, Alexander Lewis does not reside in the county where the action is brought and is a non-resident of the State of Idaho, District of Idaho.

George A. Meffen,
U. S. Marshal.

By Julia McCarter,
Deputy.

Dated at Boise, Idaho, this 8th day of February, 1938.

(Title of Court and Cause)

AFFIDAVIT FOR ORDER TO PERFECT SERVICE.

Filed February 8, 1938.

State of Idaho)
County of Ada) ss.

WILLIAM L. PHILLIPS, being first duly sworn says: that he is the plaintiff in the above entitled action; that the complaint in said action was filed with the Clerk of the Court in Third Judicial District of the State of Idaho in and for Ada County on the eighth day of February, 1937 and summons thereupon issued; that said action is an action in fraud and is brought to recover damages in the sum of $500,000 dollars. The cause of action is more particularly set out in the complaint to which reference is made. That the said defendants reside without the state, to-wit: In the State of New York, and cannot after due diligence be found within this state; that the said foreign corporation, Manufacturers Trust Company is a necessary party and has not complied with the constitution and laws of the State of Idaho, and has no agent, managing or business agent, cashier, secretary or any

station or ticket agent of said corporation in the County where action is commenced within the state upon whom service may be made; that the said defendant, Alexander Lewis, resides in the State of New York; that he is also a proper party defendant and this affiant in support thereof states the following facts and circumstances: That affiant for the purpose of finding said defendants and ascertaining the place of residence has made due and diligent inquiry and search relative to finding an officer or statutory agent or business agent, cashier or secretary, or any station, ticket or other agent of the defendant corporation and is informed and believes from such information that the said corporation has been doing business in the State of Idaho contrary to and in violation of the Constitution and laws so made and provided, relative to foreign corporations doing business in the State, and did not appoint an agent upon whom service may be made in case of suit or action be instituted against it, that the said corporation is conducting a mining business in Gem County, State of Idaho, to-wit: The Lincoln mines and was so operating and doing business at the time of bringing said suit in the State Court, but which was subsequently removed to this Court upon petition of the defendant, that the said defendant, Alexander Lewis, is a resident and inhabitant of New York, and resides without the State and District of Idaho where plaintiff resides; affiant therefore says that personal service of said summons cannot be made on said defendants; AND PRAYS FOR AN ORDER that service of said summons be made upon the auditor of Gem

County, Idaho, and copies thereof mailed to an officer or agent of the said corporation in the State of New York at 55 Broad St., City of New York, and a copy be deposited in the mail by the said auditor directed to the defendant, Alexander Lewis, at his place of residence, to-wit: at the City of New York at 45 Beaver Street, or in care of Manufacturers Trust Co., at its office, and a registered receipt returned therefore showing delivery to addressee only.

WILLIAM I. PHILLIPS.

Subscribed and sworn to before me, a Notary Public in and for the State of Idaho, this 5th day of February, 1938.

G. J. GARDNER,
(SEAL) Notary Public,
Residing at Boise, Idaho.

My Commission expires Dec. 9, 1941.

(Title of Court and Cause)

ORDER.

Filed Feb. 8, 1938.

Upon filing of affidavit in this action, and it appearing therefrom and upon the return of the Marshal, and good cause being shown therefore, it is hereby ordered that the Clerk of this Court issue summons under seal against the

defendants, and that the same be served by the United States Marshal according to law; and that the defendants appear and plead to the complaint within forty days from the date of service.

Dated this 8th day of February, 1938.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

ANOTHER SUMMONS
Filed March 16, 1938

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the above-named Defendants:

You are hereby notified that a complaint has been filed against you in the District Court of the United States for the District of Idaho, Southern Division, by the above-named plaintiff....., and you are hereby directed to appear and plead to the said complaint within forty days of the service of this summons; and you are further notified that unless you so appear and plead to said complaint within the time herein specified, the plaintiff..... will take judgment against you as prayed in said complaint, a copy of which is attached hereto, served herewith, and made a part hereof.

And this is to command you, the Marshal of said District, or your deputy, to make due service and return of this Summons. Hereof fail not.

WITNESS, The Honorable Charles C. Cavanah, Judge of the District Court of the United States, and the seal of said Court affixed at Boise, in said District, this 8th day of February, 1938.

W. D. McREYNOLDS,
Clerk.

(SEAL)

Vivian Reasor,
Deputy Clerk.

Attorney for Plaintiff:
S. T. SCHREIBER
Residence:
Boise, Idaho.

United States of America)
District of Idaho) ss.

I hereby certify that I received the within summons on the 9th day of February, 1938, and personally serviced the same on the 9th day of February, 1938, on the Manufacturers Trust Company, a corporation, and Alexander Lewis, the defendants named in said summons, by delivering to Lillian M. Campbell, Auditor and Recorder of Gem County, personally at Emmett, Idaho, a copy of said Summons, together with a copy of the complaint in said action attached to said copy of Summons.

I further certify that I left with Lillian M. Campbell,

Auditor and Recorder of Gem County, personally at Emmett, Idaho, two copies of said Summons together with copies of the complaint in said action attached to said copies of Summons to be mailed to the Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants named in said Summons. Affidavit of County Recorder, Lillian M. Campbell, is attached hereto and made a part of this return.

George A. Meffan
U. S. Marshal
By Julia McCarter
Deputy.

Dated at Boise, Idaho, this 14th day of March, 1938.

STATE OF IDAHO) ss.
COUNTY OF GEM)

I, Lillian M. Campbell, Clerk of the District Court, Gem County, Idaho, do hereby certify that in compliance with a request of Mr. George A. Meffan, U. S. Marshal of Boise, Idaho, I mailed on February 14, 1938, a summons with a copy of complaint attached in the case of William I. Phillips vs. Manufacturers Trust Company and Alexander Lewis, by registered mail, addressee only, to Alexander Lewis at 45 Broad St., New York City, New York: that on February 21st, 1938, a registered receipt was returned to the Postmaster at Emmett, Idaho, advising that said Alexander Lewis could not be found at said address; that on that same date I informed Mr.

Geo. A. Meffan, U. S. Marshal, of this fact and on February 25, 1938, I received a letter from said U. S. Marshal giving me another address which I gave to the Postmaster at Emmett, Idaho, to be forwarded to the Postmaster in New York City which was as follows: Alexander Lewis, 45 Beaver St., or c/o Manufacturers Trust Company at 55 Broad St., New York City, addressee only; that on March 2nd, 1938, the envelope containing the summons and copy of complaint, together with registered return receipt marked "Returned to sender" was received at this office and which I returned this date to Mr. George A. Meffan, U. S. Marshal, at his request.

I further certify that on March 2nd, 1938, I mailed at the request of Mr. George A. Meffan, U. S. Marshal, a summons and copy of complaint in the case of William I. Phillips vs. Manufacturers Trust Company and Alexander Lewis to Manufacturers Trust Company at 55 Broad Street, New York City, New York, by registered mail, addressee only, and on this date, March 10th, 1938, a registered return receipt was received at this office with a time stamp and the words Manufacturers Trust Company stamped on same and a signature written in ink which is not legible, which said return receipt is returned on this date to Mr. George A. Meffan, U. S. Marshal, Boise, at his request.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of March, 1938.

(SEAL) Lillian M. Campbell,
County Auditor, Gem County, Idaho.

(Title of Court and Cause)

MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT.

Filed March 23, 1938

COMES NOW, the defendant, Manufacturers Trust Company, a corporation, by its attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I.

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the sa,d corporation is not now, or at any other time has it been doing business in the State of Idaho.

II.

That service of summons and complaint in this case has never been made upon the said defendant, Manufacturers Trust Company, by personal service or otherwise, but that on or about the 9th day of February, 1938, the plaintiff caused a copy of the said summons and complaint in

this case to be served upon Lillian Maude Campbell, Auditor and Recorder of Gem County, State of Idaho, at her office in the Court House in Emmett, Idaho. That the said Auditor and Recorder above named was not on the 9th day of February, 1938, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant, Manufacturers Trust Company, was not on the said 9th day of February, 1938, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Lillian Maude Campbell, as Auditor and Recorder of Gem County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

III.

That this Honorable Court, therefore, does not have jurisdiction of the defendant corporation, Manufacturers Trust Company.

WHEREFORE, Hawley & Worthwine respectfully move that the purported service of summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 23rd day of March, 1938.

Jess Hawley
HAWLEY & WORTHWINE
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company,
a corporation,
appearing specially.

(Duly verified)

(Title of Court and Cause)

AFFIDAVIT OF MAILING
Filed March 23, 1938.

STATE OF IDAHO,)
County of Ada.) ss.

LITHA WENTZ, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of twenty-one years; that she is a clerk and stenographer employed at Boise, Idaho, by Hawley & Worthwine, attorneys; that upon the 23rd day of March, 1938, at the request of Jess Hawley, a member of said firm, she de-

posited in the United States Post Office at Boise, Idaho, postage prepaid, and caused to be registered to S. T. Schreiber, 1802 N. 8th Street, Boise, Idaho, a copy of the attached Motion to Quash Service of Summons and Complaint in the above entitled cause. That said envelope containing said paper was securely sealed and had sufficient postage thereon to carry the same by registered mail to the above named person at his address.

Litha Wentz.

Subscribed and sworn to before me this 23rd day of March, 1938.

Walter G. Bell
(SEAL) Notary Public for Idaho
Residing at Boise, Idaho.

(Title of Court and Cause)

NOTICE TO TAKE UP AND TO DETERMINE, "MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT".

Filed April 8, 1938.

TO HAWLEY AND WORTHWINE, ATTORNEYS FOR DEFENDANT:

MANUFACTURERS' TRUST COMPANY, (a corporation)

Please take notice that the Plaintiff, William I. Phil-

lips, will, on the 15th day of April, 1938, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard in the United States Courthouse at Boise, Idaho, move the Honorable Court to take up the motion of the defendant to quash service of "summons and complaint" for hearing, heretofore filed.

S. T. Schreiber,
Attorney for Plaintiff.
Residence, Boise, Idaho.

Received copy and accept service of the foregoing notice this 8th day of April, 1938.

HAWLEY AND WORTHWINE,
By Oscar W. Worthwine,
Attorneys for Defendants.
Residence, Boise, Idaho.

(Title of Court and Cause)

MOTION FOR DEFAULT

Filed April 8, 1938

TO THE HONORABLE CHARLES C. CAVANAH, JUDGE:

Comes now the Plaintiff, William I. Phillips, by his Attorney, and moves the Court to enter up default of the MANUFACTURERS' TRUST COMPANY (a cor-

poration), Defendant, for failure to answer or plea to PLAINTIFF'S complaint filed, and for want of a sufficient affidavit of defense.

S. T. SCHREIBER,
Attorney for Plaintiff,
Residence, Boise, Idaho.

Received copy and accept service of the foregoing motion this 8th day of April, 1938.

HAWLEY & WORTHWINE
By Oscar W. Worthwine,
Attorneys for Defendants,
Residence, Boise, Idaho.

Plaintiff's Exhibit No. 5
Admitted.

CITY OF NEW YORK
DEPARTMENT OF HEALTH
BUREAU OF RECORDS

New York, N. Y. APR -6 1938

Below is a photostatic copy of a certificate on file in the Bureau of Records of the Department of Health of the City of New York.

BUREAU OF RECORDS
DEPARTMENT OF HEALTH
BOROUGH OF MANAHATTAN

19919

CERTIFICATE OF DEATH

937 SEP 7 PM 2 42

1 Place of Death
BOROUGH OF MANHATTAN
No. 127 West 82 St.
Character of premises,
whether tenement, private, hotel, etc. Tenement
(If institution, state name.)

19919
Certificate No.

2 FULL NAME (PRINT) Alex Lewis
First Name Middle name Last name

3 Residence (usual place of abode)
(If nonresident, give place and State) No. 127 W. 82nd St. Borough Manh

PERSONAL AND STATISTICAL PARTICULARS

4 SEX: Male
5 COLOR OR RACE: White
6 SINGLE, MARRIED, WIDOWED, OR DIVORCED (Write the word): Single
6a WIFE) OF HUSBAND)
7 DATE OF BIRTH OF DECEDENT (Month) (Day) (Year)
8 AGE OF DECEDENT 45 yrs. mos. das. If less than 1 day hrs or min?
9
O A Trade, profession or particular
C kind of work done, as spinner,
C sawyer, bookkeeper, etc. Lawyer
U B Industry or business in which
P work was done, as silk mill,
A sawmill, bank, etc.
T C Date deceased last worked at
I this occupation
O (month and year)
N 1936
D. Total time (years) spent in this occupation 20 yrs.
10 BIRTHPLACE (State or Country) U. S.
11 How long in U. S. (if of foreign birth) Life
12 How long resident in City of New York Life
13 NAME OF FATHER OF DECEDENT Isaac
14 Birthplace OF FATHER OF DECEDENT (State or County) Russia, Poland
15 MAIDEN NAME OF MOTHER OF DECEDENT Sarah Posner
16 BIRTHPLACE OF MOTHER OF DECEDENT (State or Country) Russia, Poland
17 INFORMANT Police

MEDICAL CERTIFICATE OF DEATH

18 Date of Death Sept (month) 4 (date) 1937 (year)

19 I certify that I have this 4 day of Sept, 1937, taken charge of the body of deceased found at residence and that I have investigated the essential facts concerning the circumstances of the death.

20 I further certify that I have viewed said body and from examination and evidence, that he died on the 4 day of Sept 1937, at A M., and that the chief and determining cause of his death was
Augira pectoris and coromary selerosis
that the contributing causes were

Charles B. Loman, M. D.
Assistant Medical Examiner

Approved

Thomas A. Gough M. D.
Chief Medical Examiner.

21 PLACE OF BURIAL
WASHINGTON CEMETARY

DATE OF BURIAL
SEPT. 8th, 1937

22 UNDERTAKER
River Side Memorial Chapel Inc.
Van Omen

ADDRESS
180 West 76 A

BUREAU OF RECORDS DEPARTMENT OF HEALTH CITY OF NEW YORK.

This is to certify that the foregoing is a true copy.

THOMAS J. DUFFIELD
Registrar of Records

(JOHN T. WALSH,M.D.)
Assistant Registrar of Records

(SEAL)

NOTICE: In issuing this transcript of Record, the Department of Health of the City of New York does not certify to the truth of the statements made thereon, as no inquiry as to the facts has been provided by law.

WARNING: DO NOT ACCEPT THIS TRANSCRIPT UNLESS THE RAISED SEAL OF THE DEPARTMENT OF HEALTH IS AFFIXED THEREON.

(Title of Court and Cause)

AFFIDAVIT OF WILLIAM I. PHILLIPS IN OPPOSITION OF MOTION TO QUASH "SERVICE OF SUMMONS AND COMPLAINT", AND TO ENTER DEFAULT.

Filed April 15, 1938.

STATE OF IDAHO)
COUNTY OF ADA.) ss.

William I. Phillips being duly sworn, deposes and says: That I am William I. Phillips, the plaintiff in the above entitled action which was instituted in the District Court of the Third Judicial District in the State of Idaho in and for the County of Ada, on the 8th day of February, 1937, and removed by defendants to this Court, and that the said action is in tort, brought for damages by reason of fraud on the part of the defendants, MANUFACTURERS TRUST COMPANY, (a Corporation), ond one ALEXANDER LEWIS, both of the City and State of New York. That the said defendant MANUFACTURERS TRUST COMPANY, (a Corporation), entered the State of Idaho to do business on or about....., 1923, and at numerous times has transacted business in Idaho through its officers and agents, and has purchased property and taken titled thereto, and has attempted to convey title to properties so acquired without first com-

plying with the Constitution and the Laws of the State of Idaho, and has in violation of the Constitution and Statutes repeatedly done business, directly or indirectly through various agents, attorneys, and representatives, and evading the laws and the statutes in this behalf; that the said corporation has made various misrepresentations and false statements at numerous times, and is evading the law through its officers and agents who are acting for, and in behalf of said defendant. That the suit and action in this instance is by reason of fraudulent acts committed on or about the 19th day of November 1931, in which it caused to make and did make void and fraudulent option and lease, and collected royalties upon the premises described in plaintiff's complaint, to which reference is hereby made, and made a part of this affidavit; that since that time it has many times and continuously is doing business in the State of Idaho as is more particularly shown by the following affidavits, to-wit:—No. 1, William I. Phillips, No. 2, James Baxter, No. 3, Ralph Shaffer, No. 4, J. W. Crow, No. 5, Truman Joiner, No. 6, Fermin J. Arnold, No. 7, Robert W. Clark, No. 8, J. A. Jones, and No. 9, the affidavit of the affiant herein, including also the death certificate of the defendant, ALEXANDER LEWIS, which is made a part of this affidavit, and certifies that the said Lewis died on September 4, 1937, in the City of New York, and did not die in December 1937, as set out in the affidavit of James L. Fozard, who claims he is a Vice President of the MANUFACTURERS TRUST CO., and whose affidavit in

this connection with other matters set out therein, is absolutely erroneous and false in that behalf. Affiant further state that in a certain action wherein the MANUFACTURERS TRUST CO. and ALEXANDER LEWIS were defendants in this Court; One J. Lawrence Gilson, a witness, called for cross-examination, under the Statute, having been duly sworn, testified as follows: "The name is J. Lawrence Gilson. I reside in New York City, and I am Vice President of the Defendant MANUFACTURERS TRUST CO., I have occupied that position since April 1, 1931, but I was not connected with the MANUFACTURERS TRUST CO., or any of the banks which have merged into MANUFACTURERS TRUST CO., prior to that date. In my capacity as Vice President of the MANUFACTURERS TRUST CO., I have been generally in charge of the affairs of the MANUFACTURERS TRUST CO. in connection with the Lincoln Mine, etc."

"Alexander Lewis is employed by our Bank in the Real Estate Department. He is not an officer or director of the Company, simply an employee. I do not know how long he has been employed in the Bank. Two of the claims adjoining the Lincoln Mine *was* patented, in 1931. On the 2nd day of February 1934 in New York City, at 160 Broadway, I was asked the following questions." Q. The application for patent and all expense, both legal and otherwise, in that connection, were borne by the MANUFACTURERS TRUST CO., were they not? To which I answered, Yes. To explain that answer, very

soon after, I went to work for the Bank, there was turned over to me a letter coming directly from Mr. Brasie, saying the patent had been taken over. He was employed by the Bank to secure the patent. Patents were applied for in the name of ALEXANDER LEWIS, but were actually for the benefit of the MANUFACTURERS TRUST CO., and all expenses and costs were paid for by the MANUFACTURERS TRUST CO., The MANUFACTURERS TRUST COMPANY was the real party in interest."

"The MANUFACTURERS TRUST CO., at all time prior to that date, since 1923, had been the real owner of the Lincoln Mine, in Gem County, Idaho." The MANUFACTURERS TRUST CO., whose address is 55 Broad Street, New York City, have received royalty payments and are also working the Lincoln Mine in Gem County, Idaho, at the present time. They also have a State Compensation Insurance Policy in effect at the present time in the name of ALEXANDER LEWIS. Neither Lewis or the Trust Company have made any annual reports to the State Mine Inspector.

The preceding excerpts and quotations were taken verbatum from the transcript of the record in the case of Ojust Mining Company, (a corporation), vs. Manufacturers Trust Company, (a corporation), and Alexander Lewis, respondents; heretofore tried in this Court and appealed to the Circuit Court of Appeals.

At page 129, 130, and at page 131. The following

questions were propounded to one, Louis S. Posner, of the MANUFACTURERS TRUST CO., as follows: Q. It is a fact, is it not, Mr. Posner, that the MANUFACTURERS TRUST CO., for reasons based upon the financial statements which they, from time to time, present to their Board of Directors and Stockholders, did not desire to appear of record as the owner of mining property situated in a State where they were not legally qualified to do business? To which answer was made, as follows: A. No, I would say that was not the fact which lead to the taking of this deed in the name of Mr. Lewis, but it is impossible for me to reconstruct now, the thoughts which lead to a particular act some eleven years ago."

On page 132, the witness states, "I cannot tell you now why this property was taken in the name of the individual ALEXANDER LEWIS, rather than in the name of the real parties in interest."

And further affiant sayeth not.

William I. Phillips.

Subscribed and sworn to before me, a Notary Public, this 13th day of April, 1938.

(SEAL) G. J. Gardner,

Notary Public for Idaho, Boise, Idaho.

My Comm. expires 12/9/41

(Title of Court and Cause)

AFFIDAVIT OF MR. J. A. JONES
Filed April 15, 1938

STATE OF IDAHO)
COUNTY OF ADA)ss:

J. A. Jones first being duly sworn on oath, deposes and says, that he is Auditor in the office of the State Insurance Fund, of the State of Idaho, and as such officer has charge of the records and files in said office, that one ALEXANDER LEWIS of 55 Broad Street, New York City, New York, carries a Policy in the State Insurance Fund; that the Policy issued to ALEXANDER LEWIS, covers workmen employed at the Lincoln Mine in Gem County, Idaho, and that said Policy is now in force, and the premium thereon, has been paid on March 11th, 1938 by check, and a letter requesting that a receipt therefore be returned to ALEXANDER LEWIS on that date, and further affiant sayeth not.

J. A. Jones, Auditor

Subscribed and sworn to, before me, a Notary Public for the State of Idaho this 12th day of April, 1938.

Alice O. Ray
(SEAL) Notary Public for Idaho
Residence, Boise, Idaho.

DEED
Filed April 15, 1938

Instrument No. 14598

THIS INDENTURE, Made this 10th day of May,

in the year of our Lord One Thousand Nine Hundred and Twenty-three, between W. H. Hutchings and Ella E. Hutchings, his wife, and J. H. Richards and Fannie H. Richards, his wife, of Boise, Idaho, the parties of the first part, and ALEXANDER LEWIS of Forest Hills, Long Island, New York City, N. Y., the party of the second part.

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Thirty Thousand ($30,000) Dollars, lawful money of the United States of America, and other valuable considerations, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do GRANT, BARGAIN, SELL and CONVEY unto the said party of the second part, and his heirs and assigns forever, the following described real property, to wit:

> The three patented mining claims known as the Lincoln Group, consisting of the Lincoln Lode Mining Claim, the Alice Lode Mining Claim, and the Lookout, (sometimes known as the Outlook) Lode mining Claim, all situated in the West View Mining District in Gem County (formerly Canyon and Boise Counties), State of Idaho, and heretofore conveyed to the Lincoln Mining Company, Limited, by United States Patent No. 39067, dated June 20th, 1904, and recorded September, 6th, 1904, in Book 2 of Patents, at Page 46, in the records of

Canyon County, State of Idaho, and for a more particular description of said group of Patented Mining Claims, reference is hereby made to the said record of the same, such description in said record being made a part hereof:

And also the Annie Laurie Lode Mining Claim, not patented, situated in said West View Mining District, and lying immediately south of and adjoining the said Lincoln Lode Mining Claim.

And also the North Lincoln Lode Mining Claim, not patented, situated in said West View Mining District, and lying immediately north of and adjoining the said Lincoln Lode Mining Claim.

TOGETHER with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges and franchises thereto incident, appendent and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, their heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the

first part have hereunto set their hands and seals the day and year first above written.

($30.00 I. R. Stamps canceled)

Signed, Sealed and Delivered in the presence of
McKeen F. Morrow
J. L. Eberle

W. H. Hutchings (SEAL)
J. H. Richards (SEAL)
Fannie H. Richards
Ella E. Hutchings

STATE OF IDAHO)ss:
COUNTY OF ADA)

On this 10th day of May, in the year 1923, before, me a Notary Public in and for said County, personally appeared, W. H. Hutchings, and J. H. Richards, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal, the day and year in this certificate first above written.

(SEAL)

J. L. Eberle
Notary Public
Residence: Boise, Idaho

STATE OF IDAHO)
COUNTY OF ADA)ss:

On this 3rd day of July, 1923, before me, G. B. Thomas, a Notary Public in and for said county and State personally appeared Fannie H. Richards, wife of

J. H. Richards, and Ella E. Hutchings, wife of W. H. Hutchings, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledge to me that they executed the same.

IN WITNESS WHEREOF, I Have hereunto set my hand and affixed my Notarial Seal in the day and year in this certificate first above written.

(SEAL) G. B. Thomas
Notary Public, Boise, Idaho

STATE OF IDAHO)
COUNTY OF GEM)ss:

I hereby certify that this instrument was filed for record at the request of Karl Paine at 35 minutes past 2 o'clock P. M., this 3rd day of Jan., 1924.

Cora J. Platt, Deputy Geo. F. Church Ex-Officio Recorder

Fees, $1.60

STATE OF IDAHO)
COUNTY OF GEM)ss:

I, Lillian M. Campbell, Ex-Officio Recorder in and for Gem County, Idaho, do hereby certify that the foregoing is a full, true and correct copy of the Deed executed by W. H. Hutchings et al to Alexander Lewis as the same appears on page 599 of Book 15 of Deed Records of Gem County, Idaho.

IN WITNESS WHEREOF, I have hereunto set my

hand and affixed my official seal this 12th day of April, 1938.

(SEAL) Lillian M. Campbell
Ex-Officio Recorder
Gem County, Idaho.

PLAINTIFF'S EXHIBIT NO. 1 ADMITTED

AMERICAN SMELTING & REFINING COMPANY

M. P.-N. Y.

Murray, Utah, Oct. 26, 1932.

Pay to the order of Alexander Lewis, NO. 40714
c/o Manufacturers Trust Co.,
Address 55 Broad St., New York City, N. Y. $343.26

THE SUM OF $343.26 CTS

To American Smelting & Refining Company,
NEW YORK CITY, N. Y.

Endorsed on Front:

Paid G. W. MORRISON
Dec. 28, 1932 A. J. BOSWORTH

WARNING: The NATIONAL SURETY COMPANY WILL PROSECUTE to a Conviction anyone who tampers with this check.

Endorsed on Back

Pay to the order of
Manufacturers Trust Company
Alexander Lewis
(Two Bank Endorsements)

PLAINTIFF'S EXHIBIT NO. 2 ADMITTED

AMERICAN SMELTING & REFINING COMPANY

M. P.-N. Y.

Murray, Utah, Jan. 5, 1933

Pay to the order of Mr. Alexander Lewis. NO. 40803
c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. $738.13

THE SUM OF $738 and 13 CTS

To American Smelting & Refining Company,
NEW YORK CITY, N. Y.

G. W. MORRISON
A. J. Bosworth

Endorsed on Front: PAID FEB. 8, 1938

Warning: The National Surety Company will prosecute to a conviction anyone who tampers with this check.

Endorsed on Back

Pay to the order of
Manufacturers Trust Company
Alexander Lewis

MANUFACTURERS TRUST COMPANY
SECURITIES DEPARTMENT
55 BROAD ST.
NEW YORK CITY

PLAINTIFF'S EXHIBIT NO. 3 ADMITTED

AMERICAN SMELTING & REFINING COMPANY

M. P.-N. Y.

Murray, Utah, Dec. 14, 1932.

Pay to the order of Alexander Lewis NO. 40769

c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. $400.70

THE SUM OF $400.70 CTS

To American Smelting & Refinig Company,
NEW YORK CITY, N. Y.

G. W. MORRISON
A. J. Bosworth

ENDORSED ON FRONT: Paid Dec. 28, 1932.

Warning: The National Surety Company will prosecute to a conviction anyone who tampers with this check.

ENDORSED ON BACK

Pay to the order of

Manufacturers Trust Company

Alexander Lewis

(Two Bank Endorsements)

PLAINTIFF'S EXHIBIT NO. 4 ADMITTED

AMERICAN SMELTING & REFINING COMPANY

G. P. N. Y.

Salt Lake City, Utah, April 7, 1933

Pay to the order of Alexander Lewis, NO. 11435
c/o Manufacturers Trust Co.,

Address 55 Broad St., New York City, N. Y. $327.47
THE SUM OF $327.and 47 CTS.

To American Smelting & Refining Company
NEW YORK CITY, N. Y.

G. W. MORRISON
A. J. Bosworth

ENDORSEMENT ON FRONT: Paid Apr. 11, 1933.

Warning: The National Surety Company will prosecute to a conviction anyone who tampers with this check.

ENDORSED ON BACK

Pay to the order of
Manufacturers Trust Company
Alexander Lewis

(One Bank Endorsement)

(Title of Court and Cause)

SUPPLEMENTAL MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

Filed April 16, 1938

COMES NOW, the defendant, Manufacturers Trust Company, a corporation, by its attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and by permission of the court, does respectfully show the court:

I.

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.

II.

That heretofore and on the 23rd of March, 1938, this defendant, did, by similar motion, move to quash service of summons and complaint purported to have been made on the 2nd day of March, 1938, on this defendant, which service the defendant is informed and believes is the service upon which the plaintiff relies in this action. It appears also from the records in this case that purported service was attempted on the 5th day of

February, 1938, which service was not completed and was abandoned by the plaintiff. That relying upon said abandonment and the reissue of another summons and its purported service on the 2nd day of March, 1938, this defendant did not at the time of moving to quash said service include the purported service of February 5, 1938.

III.

That service of summons and complaint in this case has never been made upon the defendant, Manufacturers Trust Company, by personal service or otherwise, but that on or about the 5th day of February, 1938, the plaintiff caused a copy of the said summons and complaint in this case to be served upon Lillian Maude Campbell, Auditor and Recorder of Gem County, State of Idaho, at her office in the Court House in Emmett, Idaho. That the said Auditor and Recorder above named was not on the 5th day of February, 1938, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant, Manufacturers Trust Company, was not on the said 5th day of February, 1938, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Lillian Maude Campbell, as Auditor and Recorder of Gem

County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

IV.

That after the said purported service and on the 7th day of February, 1938, the plaintiff caused another summons to be issued in the above entitled court and cause and the same was returned without service for the reason stated by the United States Marshal of Idaho that the defendant could not be found. That thereafter the plaintiff made and filed in the above entitled court and cause on the 8th day of February, 1938, an affidavit to perfect service and prayed for an order for service of summons on the Recorder of Gem County, Idaho.

That thereafter and on the 8th day of February, 1938, the Judge of the above entitled court ordered the service of summons which as aforesaid was returned unserved upon the defendant.

That thereafter another summons was issued which was purported served upon the defendant on the 2nd day of March, 1938; that the plaintiff abandoned and did not rely upon the purported service made on the 5th day of February, 1938.

V.

That this Honorable Court, therefore, does not have

jurisdiction of the defendant corporation, Manufacturers Trust Company.

VI.

That heretofore this court has adjudicated that the defendant was not doing business within the State of Idaho so as to subject it to the service of process in this cause. That said adjudication was made by order of this court on the ..... day of....., 19.....

VII.

That the affidavits filed in connection with the motion to quash the said purported service of March 2nd, 1938, are hereby referred to and made a part of the showing to be considered in connection with this motion.

WHEREFORE, Hawley & Worthwine respectfully move that the purported service of summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 14th day of April, 1938.

JESS HAWLEY
HAWLEY & WORTHWINE
Residence: Boise, Idaho
Attorneys for Defendant,
Manufacturers Trust Company,
a corporation,
appearing specially.
S. T. SCHREIBER

(Title of Court and Cause)

AFFIDAVIT
Filed April 1, 1938

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss:

Lester R. Bessell, being duly sworn, deposes and says:

I am a Vice-President and Assistant Treasurer of Huron Holding Corporation, a New York corporation, and have personal knowledge of the facts hereinafter stated,

I have read the annexed affidavit of James L. Fozard and am fully familiar with the facts therein stated referring to said Huron Holding Corporation, and that said facts set forth in said affidavit are in all respects true to my own knowledge.

That said Huron Holding Corporation, on or about February 9, 1932, became the owner of the equitable interest in Lincoln Mine, Gem County, Idaho, record title to which was held by Alexander Lewis, now deceased. That said Huron Holding Corporation became such equitable owner by virtue of a written assignment made by Manufacturers Trust Company to it on or about February 9, 1932, whereby said Trust Company assigned and transferred to it two notes of Industrial Bond & Finance Corporation in the respective sums of $21,051.31

and $124,435.25, in connection with which obligations said Lincoln Mine has been conveyed, as set forth in Mr. Fozard's affidavit.

That said Huron Holding Corporation is a New York stock corporation and never was and is not now a holding company, or a subsidiary of, or affiliated with, defendant, Manufacturers Trust Company. Said Huron Holding Corporation was organized about the time that the Chatham Phenix National Bank and Trust Company was merged into defendant, Manufacturers Trust Company, on or about February 9, 1932. The stock of said Huron Holding Corporation was issued independently of the stock of said merged Trust Companies, and has been traded in continuously since then. The stock of said Huron Holding Corporation was issued to the stockholders of the said Chatham Phenix National Bank and Trust Company and Manufacturers Trust Company share for share, in exchange for non-liquid assets of said Trust Companies, which assets were purchased by said Huron Holding Corporation and paid for by its income paying debentures. That after the stock was so issued, considerable trading was had therein and much of the said stock has changed ownership and title and is not held by the same shareholders to whom it was originally issued.

That all moneys expended on the Lincoln Mine in connection with the care thereof and of the personal property thereon or anything done for the preservation thereof

has been at the sole expense of and paid by the Huron Holding Corporation and not by the defendant, Manufacturers Trust Company.

That at all times since the 9th of February, 1932, the Huron Holding Corporation has claimed to be the owner of all beneficial interests in the Lincoln Mine and the Property connected therewith which was formerly in the ownership of the defendant, Manufacturers Trust Company and that corporation has repeatedly admitted that it has no longer any beneficial interest, right or title in or to the said property, and that the same is owned by the Huron Holding Corporation.

Lester R. Bessell

Subscribed and sworn to before me this 28 day of March, 1938.

W. L. Boesch

(SEAL)

William L. Boesch,
Notary Public, Westchester County.
Commission Expires March 30, 1939.

Received Copy
March 30/38
S. T. Schreiber

(Title of Court and Cause)

AFFIDAVIT OF JAMES L. FOZARD IN CONNECTION WITH DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT

Filed April 1, 1938

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss:

JAMES L. FOZARD, being duly sworn, deposes and says:

I am a Vice-President of the Manufacturers Trust Company, a New York banking corporation and one of the defendants herein, and make this affidavit in support of the application of said defendant to quash the alleged service of the summons and complaint upon it within the State of Idaho.

That said defendant, Manufacturers Trust Company, has never done any business either directly or indirectly within the State of Idaho. That its only asset or holding within said state was its beneficial interest prior to February 9, 1932, in the mine known as the Lincoln Mine in Gem County, Idaho. That it never had any other property or interest in property within the State of Idaho.

The following is a brief history of the interest of the defendant, Manufacturers Trust Company in said mine.

On or about July 30, 1923, the Columbia Bank, a New York State banking corporation, doing business in the City of New York, loaned to Industrial Bond & Finance

Corporation, the sum of $125,000. to provide funds with which said borrower was to pay for the said Lincoln Mine. $100,000. of said loan was used for the purchase price of said mine and the balance of $25,000. was credited to the borrower's account. The loan was evidenced by the collateral note of the borrower. The deed to said Lincoln Mine was received by said bank in connection with said loan. Shortly thereafter said Columbia Bank was merged into defendant, Manufacturers Trust Company, and under the laws of the State of New York covering such a merger the Manufacturers Trust Company became the owner of the equitable interest in said mine. The legal title thereto was held by the defendant, Alexander Lewis, an employee and nominee of said Manufacturers Trust Company, and was properly recorded.

Said defendant Lewis held the legal title to the mine for the benefit of the defendant, Manufacturers Trust Company, until on or about February 9, 1932, when Manufacturers Trust Company assigned all its interest therein to Huron Holding Corporation, a New York corporation. Thenceforth said defendant Lewis, the legal title holder of said property, continued as the legal owner of record for the benefit of Huron Holding corporation instead of Manufacturers Trust Company until his death in December, 1937. The latter parted with all its interest in said mine property by assigning to said Huron Holding Corporation two notes of Industrial Bond & Finance Corporation in the respective sums of $124,435.25 and $21,051.31, which evidenced the obligation originally in-

curred to said Columbia Bank. Said notes were assigned by defendant, Manufacturers Trust Company, together with many other notes and securities aggregating many millions of dollars to said Huron Holding Corporation, by a written assignment dated February 9, 1932, and delivered on or about said date.

That under the terms of said assignment the said Manufacturers Trust Company agreed to make all necessary conveyances and assurances of title to effectuate the assignment of the notes and the securities connected therewith. That it was the intention of said Manufacturers Trust Company to assign the said Lincoln Mine and all the properties connected therewith in which it had any interest whatsoever in the State of Idaho. That from that date on it has repeatedly admitted that it no longer held any beneficial interest, right or title in the said Lincoln Mine or any property connected therewith in the State of Idaho, and that the said Huron Holding Corporation, the assignee under said written assignment, was the owner of all the interests in said property, and has at all times been able, ready and willing to make such further assurances of title and conveyance thereof to the said Huron Holding Corporation. That it has not since the date of the said written assignment had or claimed any interest whatsoever in and to the said Lincoln Mine and the property connected therewith.

Said Huron Holding Corporation was not and is not now a holding corporation or a subsidiary of, or affiliated with, defendant, Manufacturers Trust Company, but an

independent corporation as shown by the annexed affidavit of Lester R. Bessell, one of its officers.

On or about March 26, 1926, said defendant, Manufacturers Trust Company, through the defendant, Alexander Lewis, the record and legal title holder of said mine, leased the same to one H. W. Dorman, with an option of purchase, but said lease was breached by the tenant in possession and on or about August 22, 1931, Lincoln Mine Operating Company, which was the successor of the said Dorman, surrendered the premises and executed and delivered to the defendant, Alexander Lewis, a quitclaim deed to said property. That at all times the said plaintiff herein was and still is the President of the said Lincoln Mine Operating Company and the holder of the majority of the issued capital stock thereof; and in active charge of the management of said corporation.

Thereafter, and on or about November 21, 1931, a lease was made by the defendant Lewis to the Plaintiff for ten years, which lease was thereafter breached by the tenant in possession and the premises surrendered to the owner on or about April 25, 1933.

After February 9, 1932, defendant, Manufacturers Trust Company, has had no interest in said mine. Its only contact with the Huron Holding Corporation with reference to said mine was a management agreement entered into between it and said Huron Holding Corporation in order to lend to the latter the facilities of said Manufacturers Trust Company in the liquidation of the

various accounts transferred and assigned as aforesaid, but at no time during the performance of that agreement, or at any other time, did defendant, Manufacturers Trust Company, work said mine or do any other business in the State of Idaho.

That the expenditures made in the preservation and care of the said Lincoln Mine since February 9, 1932, has been at the sole expense and cost of the Huron Holding Corporation, and the defendant, Manufacturers Trust Company, has not made any expenditures, or incurred any indebtedness on its own account in connection either with the preservation or the care or otherwise in connection with said Lincoln Mine in the State of Idaho.

That the foregoing facts are within my personal knowledge and the annexed affidavit is offered in corroboration and support thereof.

James L. Fozard

Subscribed and sworn to before me this 28 day of March, 1938.

W. L. Boesch
Notary Public.

(SEAL)

Received Copy
Mar. 30/38
S. T. Schreiber

(Title of Court and Cause)

MINUTES OF THE COURT OF APRIL 16, 1938.

The motions pending herein were reset for ten o'clock A. M. on April 22nd, 1938.

(Title of Court and Cause)

MINUTES OF THE COURT OF APRIL 22, 1938.

The motion of Manufacturers Trust Company to quash service of summons was argued before the Court by counsel for the respective parties.

Wm. I. Phillips was sworn and examined as a witness and documentary evidence was introduced.

The Plaintiff's motion for the entry of default was also argued. At the conclusion of the argument, the Court took the motion to quash under advisement, and denied the motion for entry of default.

(Title of Court and Cause)

OPINION
Filed May 5, 1938.

S. T. Schreiber, Boise, Idaho,
Attorney for the Plaintiff.
Hawley & Worthwine, Boise, Idaho,
Attorneys for the Defendants.

May 5, 1938.

CAVANAH, District Judge.

The sole question remaining for decision on the motion to quash service of summons and complaint, as the other questions presented at the same time were disposed of from the bench, is, was the defendant Manufacturers Trust Company, organized under the laws of the State of New York, doing business in the State of Idaho, when the attempted service was made on February 5, 1938, upon the Auditor of Gem County, Idaho? If not, then the Court would not obtain jurisdiction of the foreign corporation.

The nature of the action is one where it is alleged that the contract and conspiracy were made outside of the State of Idaho and in New York. The cause of action arose in New York and the attempted service here is not sufficient to give this Court jurisdiction of such cause of action. Simon v. Southern Railway Company, 236 U. S. 115.

That statute under which service was attempted to be made is one relating to service upon a foreign corporation and it requires that at the time the service is made such corporation must then be doing business within the state, Section 5-507.

What then is the showing upon the special motion to quash service?

It appears that the defendant Manufacturers Trust

Company, on February 9, 1932, transferred all of its interest in the property then owned by it to the Huron Holding Corporation and has not since then been doing business within the State of Idaho.

The showing presented by the plaintiff falls far short of establishing that the defendant Manufacturers Trust Company owned property or was doing business in the State of Idaho at the time the attempted service of summons and complaint was made. Of course, service of process against a foreign corporation is not effective when service upon a state officer is made if the corporation is not at the time doing business in the state. Old Wayne Mutual Life Association of Indianapolis v. McDonough, 204 U. S. 8; Simon v. Southern Railway Company, supra.

Of course, it is elementary that jurisdiction of persons of the defendants is acquired by the service of process and not upon the return. Blandy v. Modern Box Manufacturing Company, 40 Idaho 356.

Although the motion for default of the defendant was overruled from the bench at the conclusion of the hearing and the views of the Court then given, it will be repeated here that the first special motion to quash the service of summons in the body of it expressly states that the defendant Manufacturers Trust Company moves to quash the service of the summons and complaint although the prayer states to quash the summons and complaint. It is the substance and representations and contentions of the

parties then presented on the motion that governs when in determining what was the motion. Admittedly at the time the first motion to quash, it was presented to the Court as a motion to quash the service.

The conclusion reached from the facts is that the Manufacturers Trust Company was not doing business in the State of Idaho at the time the attempted service of summons was made on February 5, 1938, for it had prior thereto disposed of and transferred all its interest in the state to the Huron Holding corporation in February 1932, who took it over. It seems that the legal and record title of the Lincoln Property has for some time stood in the name of the defendant Lewis, however that may be, it stands uncontradicted from the showing here made that the defendant Manufacturers Trust Company prior to the time attempted service of summons was made upon the Auditor of Gem County, Idaho, it had transferred in February 1932 all of its interest in this State to the Huron Holding Corporation and had ceased doing business in this State.

It follows then that the motion of the defendant Manufacturers Trust Company to quash service of summons is sustained.

(Title of Court and Cause)

ORDER.

Filed May 5, 1938.

In harmony with memorandum opinion filed this date, the motion of the plaintiff to enter the defaut of the defendant Manufacturers Trust Company a corporation, and the motion of the defendant Manufacturers Trust Company, a corporation to quash service of summons and complaint having been presented and after consideration of the same it is ORDERED:

1. That the motion of the plaintiff for default is denied.

2. That the motion of the defendant Manufacturers Trust Company, a corporation, to quash the service of summons and complaint on it is granted.

Exception allowed.

Dated May 5, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

EXCEPTIONS TO RULINGS.

Lodged May 10, 1938.

BE IT REMEMBERED, That on this 22nd day of April, 1938, came on to be heard the plaintiff's motion for default, and the motion of defendant's "to quash the service of summons and complaint" in the above entitled ac-

tion, No. 1971, and the Court hearing argument first, on the motion of the defendant's to quash and second the argument on plaintiff's motion for default, by reason of defendants failure of filing an affidavit of defense, and a failure of compliance by defendant with rule 25 of this court, and the court from the bench having over-ruled the motion of the Plaintiff's for a default, and stating that the sole question before the Court, "was the defendant, MANUFACTURERS TRUST COMPANY, doing business in the State of Idaho at the time, February 5, 1938," to which rulings of the court in all things plaintiff then and there excepted, and hereby tenders his bill of exceptions, requesting the same be made a part of the record because none of the said matters otherwise appear, and plaintiff prays that his exceptions be signed, and allowed, and approved, and made a part of the record pursuant to rules, and practice in such case made and provided; and is accordingly done.

Dated this.....day of May, 1938.

.....

Judge of the Entitled Court.

(Title of Court and Cause)

BILL OF EXCEPTIONS.
Filed May 12, 1938.

Be it remembered that on the 22nd day of April 1938,

came on to be heard the plaintiff's motion for default, and defendant's motion to quash the service of summons and complaint in the above entitled action, and the Court after hearing argument of respective counsel and considering the same entered an Order sustaining the motion to quash service of summons and complaint and overruling motion of the plaintiff for default, to which ruling of the Court in all things plaintiff then and there excepted and hereby tenders his bill of exceptions, requesting the same to be made a part of the record and the plaintiff prays that his exceptions be signed, allowed and approved, and made a part of the record pursuant to rules and practice in such case made and provided and is accordingly done.

Dated May 12, 1938.

CHARLES C. CAVANAH,
United States District Judge.

(Title of Court and Cause)

MOTION TO REMAND TO STATE COURT.
Filed June 11, 1938.

TO THE HONORABLE C. C. CAVANAH, JUDGE OF THE ABOVE ENTITLED COURT:

Now comes the plaintiff by his Attorney of record in the above entitled cause, and moves the Court to remand said cause to the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, from

which it was removed, for trial, upon the following grounds. That this Court has ruled that the defendant, Manufacturers Trust Company, a foreign corporation, was not doing business in the State of Idaho at the time to-wit: February 5, 1938, when the attempted service was made from this Court, and that the said defendant was not within its jurisdiction.

Said Motion is based upon the record, and for reasons apparent therein, and the law in the particular case.

S. T. Schreiber,
Attorney for Plaintiff,
Residence, Boise, Idaho.

(Title of Court and Cause)

MINUTES OF THE COURT OF JUNE 13, 1938.

The case came on for hearing on the plaintiff's motion to remand the case to the State Court, which motion was resisted by the defendants. Said motion was argued before the Court by counsel for the respective parties.

Whereupon, the Court announced his conclusions, and ordered the motion to remand be, and the same hereby is denied.

(Title of Court and Cause)

ORDER.

Filed June 13, 1938.

In harmony with memorandum opinion filed in this case on May 5, 1938, and the record, files and proof heretofore presented where it appears that the motions to quash service of summons upon the defendant Manufacturers Trust Company were sustained and the motion of the plaintiff to again remand the cause to the State Court, filed on the 11th day of June, 1938, having been presented by counsel for the respective parties in Court on this day and after a consideration and determination of the motions to quash service of summons and the motion to again remand the cause to the State Court, and it appearing therefrom that service of summons cannot be made upon the defendant Manufacturers Trust Company within the State of Idaho, issued either out of this Court or the State Court, for the reasons appearing in said memorandum filed May 5, 1938, and the record, and under the laws of the State of Idaho, this Court is without Federal jurisdiction to proceed further with the case and should dismiss the same.

Now, Therefore, It is ORDERED that said cause be dismissed with defendant Manufacturers Trust Company's Costs

Dated this 13th day of June, 1938.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

BILL OF EXCEPTIONS.

Filed June 21, 1938.

Be it remembered that on the 13th day of June, 1938, came on to be heard, the plaintiff's motion heretofore filed on the 11th day of June, 1938, to remand the said cause to the District Court of the Third District of the State of Idaho, in and for Ada County, from which it was removed, and for the reasons specified in the motion, the Court hearing argument of the plaintiff, and also allowed defendant's attorney to present argument in opposition thereto, to which plaintiff objected, and after re-consideration and determination of defendants former motion to quash service of summons against the Manufacturers Trust Company, a corporation, the Court again refused to remand the cause for the reason appearing in the memorandum opinion filed as of May 5, 1938; and upon the affidavits filed, the entire records and files in the cause and under the laws of the State of Idaho; that the Court is without Federal Jurisdiction to proceed further and should dismiss the same, and did order and did dismiss the complaint against said Manufacturers Trust Company, a corporation, with costs, to which rulings of the Court in all things, Plaintiff excepted and hereby tenders his Bill of Exceptions requesting it be made a part of the record; and plaintiff prays that his exception be signed,

allowed, and approved, and made a part of the record, pursuant to rules and practice in such case, made and provided.

Dated this 21st day of June, 1938.

Charles C. Cavanah, .
United States District Judge.

(Title of Court and Cause)

ORDER.
Filed August 11, 1938.

The proposed bill of exceptions filed on August 5, 1938 and the amendments and objections thereto filed on August 10, 1938 were on August 10, 1938, presented to me for settlement, and after considering the same I find that the proposed bill of exceptions contains matters of pleadings and records of the Clerk's office which are properly part of Clerk's record and not a part of the Bill of Exceptions to now be settled by the Judge of this Court, and does not comply with or contain the matters required to be contained and incorporated in a general Bill of Exceptions to now be settled as required by rule 76 of this Court, which is:

> "A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial,, if the ruling was made during a

trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the Clerk must as soon as practicable, thereafter notify or inform both parties of the time

so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk."

And therefore the same should not now be settled by the Judge of the Court and settlement of the same is denied.

Dated August 11, 1938.

Exception allowed.

Charles C. Cavanah,
District Judge.

(Title of Court and Cause)

PETITION FOR APPEAL.
Filed August 23, 1938.

TO THE HONORABLE CHARLES C. CAVANAH, JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION:

Comes now the petitioner, William I. Phillips, who is

plaintiff in the above entitled cause and respectfully shows, that on or about June 13, 1938, judgment of dismissal was entered in this court in this cause against the plaintiff and in favor of the defendants, Manufacturers Trust Company, a corporation, and Alexander Lewis, dismissing the complaint in which judgment, orders, and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this petitioner all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said action is an action at law for the recovery of damages for fraud by defendants committed against plaintiff.

And your petitioner feeling and considering himself aggrieved by the orders and judgment of dismissal made and entered on said date in the above cause, does hereby appeal from the whole thereof to the United States Circuit Court of Appeals of the Ninth Circuit under the laws of the United States, made and provided, and for the reasons specified in the assignment herewith filed.

WHEREFORE, your petitioner desires that said appeal shall be allowed, and therefore PRAYS that an Order be made fixing the amount of security and costs, which said William I. Phillips shall give and furnish upon such appeal, that citation may issue as provided by law, that a transcript of the records, proceedings and papers in said cause duly authenticated, may be sent to said Circuit Court of Appeals, and that upon giving such se-

curity further proceedings in this Court be suspended and stayed until the determination of said Appeal by the Ninth Circuit Court.

Dated August 23rd, 1938.

S. T. SCHREIBER,
Attorney for Petitioner,
William I. Phillips,
Residence, Boise, Idaho.

Received a copy and accept service of the foregoing petition for appeal, this 23d day of August, 1938.

HAWLEY & WORTHWINE,
Attorneys for Defendants,
Residence, Boise, Idaho.

The ABOVE AND FOREGOING PETITION together with ASSIGNMENT OF ERRORS, and PRAYER for reversal having been this day filed, and to me presented:

IT IS HEREBY ORDER, THAT THE SAID PETITION AND APPEAL, AS THEREIN PRAYED, BE AND THE SAME IS, HEREBY GRANTED AND ALLOWED:

It is further ORDERED that petitioner give bond in the sum of FIVE HUNDRED ($500.00) DOLLARS with sufficient surety to be approved by the undersigned and conditioned to prosecute said appeal to effect, and if

it fail, to make his plea to answer all costs as by law required.

Dated at Boise, Idaho, this 23d day of August, 1938.

CHARLES C. CAVANAH,
Judge of the Above Entitled Court.

(Title of Court and Cause)

ASSIGNMENT OF ERRORS.
Filed August 23, 1938.

COMES NOW, William I. Phillips, plaintiff and appellant in the above entitled action by his attorney of record, and makes and files, with his petition for appeal in this action, assignment of the following errors, which he asserts occurred on the trial thereof, and intends to urge on said appeal, and upon which he relies to reverse the Judgment entered herein as appears of record:

(1.) That the Court erred in assuming jurisdiction of the cause in the first instance, on removal from the State Court to the Federal Court, and in denying the motion to remand.

(2.) The Court erred in his judgment of October 5th, 1937, in setting aside the default of defendant, Manufacturers Trust Company, and in quashing the service of summons and complaint in the action.

(3.) The Court further erred in denying the motion

of plaintiff filed on the 11th day of June, 1938, to remand said action to the State Court of the Third Judicial District of the State of Idaho, in and for Ada County from which it was removed for trial.

(4.) And the court erred in dismissing the action on June 13, 1938, after the Statutes of Limitation, preventing the filing of a new action, had run thereby depriving plaintiff of enforcing his demands against defendants.

(5.) And erred in rendering Judgment for cost to defendants.

WHEREFORE, Plaintiff, appellant prays that the judgment entered in said action in the above entitled court on the 13th day of June, A. D., 1938, be reversed, and that the said United States District Court be ordered and directed to remand the same for trial to the State Court.

S. T. Schreiber,
Attorney for Plaintiff and
Appellant,
Residing at Boise, Idaho.

Service of the above and foregoing Assignment of Errors, by receipt of copy thereof, this 23rd day of August, A. D., 1938, is hereby acknowledged.

Hawley & Worthwine,
Attorneys for Defendants
and Appellees.

(Title of Court and Cause)

BOND ON APPEAL.

Filed August 23, 1938.

KNOW ALL MEN BY THESE PRESENTS: That we, William I. Phillips as principal, and J. H. Hopffgarten and W. H. Biggs, as sureties, acknowledge ourselves to be jointly indebted to the Manufacturers Trust Company, a corporation, and Alexander Lewis, appellees in the above entitled cause in the sum of FIVE HUNDRED ($500.00) DOLLARS, (as indicated by the Judge allowing the appeal), conditioned that;

Whereas on the 13th day of June, A. D. 1938, in the District Court of the United States for the District of Idaho, in a suit depending in that court, wherein William I. Phillips was plaintiff, and Manufacturers Trust Company and Alexander Lewis, defendants, numbered on the docket as #1971, a judgment of dismissal was rendered against the said William I. Phillips, and the said William I. Phillips having obtained or is about to obtain an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said judgment, and a citation directed to the said Manufacturers Trust Company and Alexander Lewis, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the.....day of October, A. D. 1938, next.

NOW, IF THE SAID WILLIAM I. PHILLIPS

shall prosecute his appeal to effect and answer all damages for costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

William I. Phillips,
Principal.
J. H. Hopffgarten,
Surety.
W. H. Biggs,
Surety.

COUNTY OF ADA,)
STATE OF IDAHO) ss.

J. H. Hopffgarten and W. H. Biggs, whose names are subscribed as the sureties to the above undertaking being severally duly sworn, each for himself and says: That he is a resident and free holder within the said County of Ada, and State of Idaho; that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

J. H. Hopffgarten,
Surety.
W. H. Biggs,
Surety.

Subscribed and sworn to before me, a Notary Public for the State of Idaho, this 18th day of July, 1938.

Elmer W. Fox,
Notary Public for Idaho,
Residing at Boise, Idaho.

(SEAL)

Approved this 23rd day of August, 1938.

Charles C. Cavanah,

Judge.

(Title of Court and Cause)

CITATION.

Filed August 23, 1938.

TO THE UNITED STATES OF AMERICA, (ss. THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE MANUFACTURERS TRUST COMPANY, A CORPORATION, AND ALEXANDER LEWIS, DEFENDANTS, ABOVE NAMED, AND JESS HAWLEY AND OSCAR W. WORTHWINE, THEIR ATTORNEYS, GREETINGS:

You and each of you are hereby cited and admonished to be present in the City of San Francisco, State of California, within thirty days from the date of this WRIT, pursuant to appeal duly allowed and filed in the Clerk's Office of the District Court of the United States for the District of Idaho, Southern Division, wherein William I. Phillips is appellant and you are appellees to show cause, if any there be why the judgment and order against said appellant, in said appeal mentioned, should not be corrected and speedy justice be done to the party in that behalf.

WITNESSETH: The Honorable Charles C. Cavanah, Judge of the District Court of the United States, in

and for the District of Idaho, Southern Division, this 23rd day of August A. D., 1938, and of the Independence of the United States, the One Hundred and Sixty-second year.

Charles C. Cavanah,
Judge of the United States District Court for the District of Idaho, Southern Division.

Attest:

W. D. McReynlods, (SEAL)
Clerk.

Service of the above and foregoing citation by receipt of copy thereof, this 23rd day of Aug. A. D., 1938, is hereby admitted.

Hawley & Worthwine,
Residing at Boise, Idaho,
Attorneys for Defendants.

(Title of Court and Cause)

PRAECIPE.

Filed August 23, 1938.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare, print, authenticate, transmit and return to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in

accordance with the Act of Congress, approved February 13, 1911, (28 U. S. C. 865-866), together with the amendments and the rules of the Court adopted thereunder, transcript of the record in the above entitled action on the appeal of William I. Phillips, Plaintiff, vs. Manufacturers Trust Company, a corporation, and Alexander Lewis, defendants, to said Court from the judgment and order of dismissal made and entered in said action by the above entitled court on the 13th day of June, 1938, which said appeal was duly allowed and filed in your office on the 23rd day of August, 1938, and include in said transcript the following:

Complaint	February 8, 1937
Summons—Ada County	February 8, 1937
Return—Ada County	February 27, 1937
Summons—Gem County	February 8, 1937
Return—Gem County	February 11, 1937
Affidavit of Lillian M. Campbell	February 27, 1937
Affidavit of Lillian M. Campbell	February 27, 1937
Notice of Motion to Quash	February 27, 1937
Petition for Removal	February 27, 1937
Bond on Removal	February 27, 1937
Notice to Quash	February 27, 1937
Opposition of Motion to Quash, and Objections to Allowance of Removal	March 3, 1937
Affidavit of Ralph Shaffer	March 3, 1937
Affidavit of William I. Phillips	March 4, 1937
Authority of Attorney to Sign Bond	March 4, 1937

Order of Removal	March 4, 1937
Corrected Minutes	March 4, 1937

The above papers constitute the record on removal from the State Court to the Federal Court.

Certificate on Removal	March 18, 1937
Motion to Remand	March 30, 1937
Affidavit on Motion to Remand (Baxter)	March 30, 1937
Affidavit on Motion to Remand (Arnold)	March 30, 1937
Affidavit on Motion to Remand (J. W. Crow)	March 30, 1937
Affidavit of Service—Lillian M. Campbell	April 9, 1937
Letter to Lewis by Auditor Campbell	April 9, 1937
Affidavit on Motion to Remand (Joiner)	April 9, 1937
Minutes of Court	April 14, 1937
Exceptions to Rulings	April 22, 1937
General Power of Attorney	April 14, 1937
Minutes of Court (Joint power of Attorney)	April 15, 1937
Order of Motion to Remand—Denied	April 16, 1937
Notice of Renewal of Motion to Remand	April 27, 1937
Renewal of Motion to Remand to State Court	April 27, 1937
Affidavit on Motion to Set Aside Overruled Motion—Remand Cause	April 27, 1937

Minutes of the Court	May 4, 1937
Bill of Exceptions	May 10, 1937
Praecipe for Default	June 2, 1937
Default	June 2, 1937
Motion to make Default Judgment Final	July 6, 1937
Motion to set aside Default (Manufacturers Trust Company)	August 6, 1937
Return on Service of Writ	August 5, 1937
Motion to set aside Default (Alexander Lewis)	August 6, 1937
Return of Service of Writ	August 5, 1937
Minutes of Court	September 13, 1937
Minutes of Court	September 30, 1937
Order of Court	October 5, 1937
Opinion of Court	October 5, 1937
Minutes of Court	October 5, 1937
Exceptions	October 20, 1937
Notice of Motion to Reconsider Order Overruling Motion to Remand	October 21, 1937
Motion to Reconsider Order Overruling Motion to Remand	October 21, 1937
Affidavit in Support of Motion to Reconsider (Robert Clark)	January 3, 1938
Minutes of Court	January 5, 1938
Exceptions	January 7, 1938
Summons from Federal Court Issued	February 7, 1938

Return of Summons	February 7, 1938
Summons	February 8, 1938
Return of Summons	February 8, 1938
Affadivit for Order to Perfect Service (William I. Phillips)	February 8, 1938
Order for Clerk to Issue Summons	February 8, 1938
Summons	February 8, 1938
Return	March 14, 1938
Affidavit—Lillian M. Campbell	(No Filing Mark)
Motion to Quash Service of Summons and Complaint	March 23, 1938
Affidavit of Mailing	March 23, 1938
Notice of Motion to Determine Motion to Quash Service of Summons and Complaint	April 8, 1938
Motion for Default	April 8, 1938
Certificate of Death (Alexander Lewis)	(No Filing Mark)
Affidavit in Opposition of Motion to Quash Service of Summons and Complaint (Phillips)	April 15, 1938
Affidavit in Opposition of Motion to Quash Service of Summons and Complaint (Jones)	April 15, 1938
Instrument—Deed—Checks	April 15, 1938
Supplemental Motion to Quash Service of Summons and Complaint	April 16, 1938
Affidavit of Bessell	April 1, 1938
Affidavit of Fozard	April 1, 1938

Minutes of Court	April 16 and 22, 1938
Opinion of Court	May 5, 1938
Order of Court	May 5, 1938
Exceptions	May 12, 1938
Motion to Remand to State Court	June 11,1938
Minutes of Court	June 13, 1938
Judgment and Order for Dismissal	June 13, 1938
Bill of Exceptions	June 21, 1938

Compiled Bill of Exceptions as proposed August 5, 1938.

Amendments and Objections to Compiled, proposed Bill of Exceptions, August 10, 1938.

Dis-allowance of Bill of Exceptions, August 11, 1938.

All orders extending time for settling and filing Bill of Exceptions.

All Court Minutes and Journal Entries.

Petition for Appeal

Assignment of Errors

Order Allowing Appeal

Bond on Appeal and Approval

Citation

Copy of this Precipe

Order for Transmission of Exhibits

Your Certificate and Return

Rules of the Court, Nos. 25, 76, 82, 94.

In the preparing of the above records, you will please

omit the title to all pleadings, except the complaint, insert in lieu thereof, "Title of Court and Cause", followed by the name of the pleadings of instruments, and also omit the verification of all pleadings, inserting in lieu thereof, the words "Duly Verified".

Dated this 23rd day of August, 1938.

S. T. SCHREIBER,
Residing at Boise, Idaho,
Attorneys for Appellant.

Service of the above and foregoing Praecipe, by receipt of copy thereof this 23rd day of Aug., 1938, is hereby acknowledged.

HAWLEY & WORTHWINE,
Residing at Boise, Idaho,
Attorneys for Defendants and Appellees.

(Title of Court and Cause)

NOTICE OF FILING PRAECIPE.
Filed August 26, 1938.

TO MESSRS. HAWLEY & WORTHWINE, ATTORNEYS FOR DEFENDANTS:

PLEASE TAKE NOTICE, That on the 23rd day of August, 1938, the undersigned, filed with the Clerk of this Court a Praecipe for the record to be transmitted to

the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, on the appeal allowed in the above cause, a copy of which Praecipe has been served upon you.

You are further notified that in the interest of saving cost and expense, the Clerk has been instructed to eliminate, by striking from said Praecipe, the following two items, to-wit:

Compiled Bill of Exceptions, filed August 5, 1938.

Amendments and Objections filed, August 10, 1938.

S. T. SCHREIBER,
Attorney for Plaintiff,
Appellant.

Received copy and *except* service of the foregoing Notice this .....day of August, 1938.

HAWLEY & WORTHWINE,
Attorneys for Defendants and
Appellees.

(Title of Court and Cause)

NOTICE.
Filed August 26, 1938

TO THE CLERK OF THE ABOVE ENTITLED COURT:

In preparing the record according to the Praecipe, heretofore filed in the above entitled case on August 23, 1938,

you are hereby instructed to omit therefrom, the following two items to-wit:

Compiled Bill of Exceptions, filed August 5, 1938.

Amendments to same and Objections to same, filed August 10, 1938.

Notice and copy of the foregoing as on this day served upon Attorneys for Defendants and Appellees.

Dated at Boise, Idaho, August 26, 1938.

S. T. SCHREIBER,
Attorney for Plaintiff,
Appellant.

Copy received Aug. 26-38.

HAWLEY & WORTHWINE.

RULES

Rule No. 25

EXTENSION OF TIME TO PLEAD—MOTION TO QUASH SUMMONS, ETC.

The pendency of a motion directed to the summons, complaint or answer shall enlarge the time to answer or demur, as the case may be, until the decision upon such motion and such time thereafter as may at the time of such decision be allowed; PROVIDED, that such motion be accompanied with a certificate of an attorney of this Court that he believes the motion well founded in point of law, and that it is not interposed for delay.

Rule No. 76

BILL OF EXCEPTIONS

A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the

Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and the Clerk must, as soon as practicable, thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk.

Rule No. 82

EXTENSION OF TIME

When an act to be done in any action at law or suit in equity which may at any time be pending in this Court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, or to new trials the time allowed by these rules may, unless otherwise specially provided, be extended by written stipulation, or by the Court or Judge by order made before the expiration of such time. It shall be the duty of every party, attorney, solicitor, or counsel, or other person ap-

plying to the Court or Judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceedings which have previously been obtained from the adverse party or granted by the Court or Judge; and any extension obtained from the Court or Judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the Court or Judge to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party.

Rule No. 94

OBJECTIONS TO THE JURISDICTION OF THE COURT

Objections to the jurisdiction of this Court, as a Federal Court over any action at law, or suit in equity which has been removed from a State Court to this Court, may be made on a motion to remand such action or suit to the State Court.

Objections to the jurisdiction of this Court, as a Federal Court, over any action at law or suit in equity whether commenced in this Court or removed from a State Court to this Court and not remanded, may be taken as follows: If the objection appear on the face of the complaint or bill, it may be taken either by motion to dismiss PROVIDED, that the Court may in its discretion on sus-

taining the motion to dismiss, allow the complaint or bill to be amended. If the objection do not appear on the fact of the complaint or bill, it may be taken by the answer. If not taken as above provided, and the facts in relation to the jurisdiction do not subsequently appear in the course of the proceedings, the Court may refuse to allow the party thereafter to take proceedings for the purpose of making such facts appear. But if such facts be subsequently developed in the course of the proceedings, the party may then move to dismiss the case, or if it was removed from a State Court ,to remand it to such Court; or the Court may dismiss or remand it of its own motion; PROVIDED, that in whatever mode the objection may be taken, and whether it be taken by the Court of its own motion or by a party to the cause, the party affected shall be accorded a hearing on the question.

(Title of Court and Cause)

OBJECTIONS TO PRAECIPE

Filed August 29, 1938

TO THE CLERK OF THE ABOVE ENTITLED COURT:

The defendant, Manufacturers Trust Company, objects to the preparation, printing, authenticating, transmitting and returning to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, Cali-

fornia, the following files included in the praecipe filed by the plaintiff herein:

Affidavit of Lillian M. Campbell, filed February 27, 1937.

Affidavit of Lillian M. Campbell, filed February 27, 1937.

Affidavit of Ralph Shaffer, filed March 3, 1937.

Affidavit of William I. Phillips, filed March 4, 1937.

Affidavit on Motion to Remand (Baxter), filed March 30, 1937.

Affidavit on Motion to Remand (Arnold), filed March 30, 1937.

Affidavit on Motion to Remand (J. W. Crow), filed March 30, 1937.

Affidavit of Service—Lillian M. Campbell, filed April 9, 1937.

Letter to Lewis by Auditor Campbell, filed April 9, 1937.

Affidavit on Motion to Remand (Joiner), filed April 9, 1937.

Affidavit on Motion to set aside Overruled Motion—Remand Cause, filed April 27, 1937.

Affidavit in support of Motion to Reconsider (Robert Clark), filed January 3, 1938.

Affidavit for Order to Perfect Service (William I. Phillips), filed February 8, 1938.

Affidavit—Lillian M. Campbell (No filing mark).

Certificate of Death (Alexander Lewis) (No filing mark).

Affidavit in Opposition of Motion to Quash Service of Summons and Complaint (Jones), filed April 15, 1938.

Affidavit of Bissell.

Affidavit of Fozard.

on the following grounds:

(a) That each of the described papers are affidavits and are not properly a part of the record in this case on appeal.

(b) That said papers have not been included in any bill of exceptions.

(c) That the incorporation of said papers and each of them constitutes an unnecessary, expensive and unjustified addition to the record.

Defendant gives notice hereby that it will move to dismiss the appeal on the ground that the record is not a proper record for the reasons above stated.

Dated August 27, 1938.

JESS HAWLEY,
OSCAR W. WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company.

(Title of Court and Cause)

AFFIDAVIT OF MAILING
Filed August 30, 1938

STATE OF IDAHO,)
County of Ada.) ss.

LITHA WENTZ, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of twenty-one years, that she is a clerk and stenographer employed at Boise, Idaho, by Hawley & Worthwine, attorneys; that upon the 27th day of August, 1938, at the request of Jess Hawley, a member of said firm, she deposited in the United States Post Office at Boise, Idaho, postage prepaid, and caused to be registered, copy of Objections to Praecipe in the above entitled cause, to S. T. Schreiber, 1802 North 8th Street, Boise, Idaho. That said envelope containing said paper was securely sealed and had sufficient postage thereon to carry the same by registered mail to the above named person at his address.

LITHA WENTZ.

Subscribed and sworn to before me this 30th day of August, 1938.

CHAS. W. MACK,
(SEAL) Notary Public for Idaho,
Residing at Boise, Idaho.

(Title of Court and Cause)

DEFENDANT'S PRAECIPE

Filed August 30, 1938

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare, print, authenticate, transmit and return to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in accordance with the Act of Congress approved February 13, 1911, (28 U. S. C. 865-866) together with the amendments and the rules of the court adopted thereunder, transcript of the record in the above entitled action on the appeal of William I. Phillips, Plaintiff, vs. Manufacturers Trust Company, a corporation, and Alexander Lewis, Defendants, to said court from the judgment and order of dismissal made and entered in said action by the above entitled court on the 13th day of June, 1938, which said appeal was duly allowed and filed in your office on the 23d day of August, 1938, and include in said transcript the following:

Objections to Praecipe, filed August 29, 1938.

Affidavit of Mailing, filed August 30, 1938.

Dated this 30th day of August, 1938.

HAWLEY & WORTHWINE
JESS HAWLEY
OSCAR W. WORTHWINE
Residence: Boise, Idaho,
Attorneys for Defendant,
Manufacturers Trust Company.

(Title of Court and Cause)

ORDER FOR TRANSMISSION OF EXHIBITS

Filed September 1, 1938

Upon application of counsel for the appellant herein,

IT IS ORDERED That all original exhibits admitted and filed in the above entitled case be transmitted, by the Clerk of this Court, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in connection with the apeal in said cause to that Court.

Dated at Boise, Idaho, this 1st day of September, 1938.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

CERTIFICATE OF CLERK

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 164 inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe of the appellant and appellee filed herein.

I further certify that the cost of the record herein amounts to the sum of $194.35 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 10th day of September, 1938.

W. D. McREYNOLDS, Clerk.

(SEAL)

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY, a Corporation, and Alexander LEWIS,

Appellees.

BRIEF OF APPELLANT.

Upon Appeal from the District Court of the United States, in and for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

S. T. SCHREIBER and
ALFRED FRASER,
Attorneys for Appellant,
Residence: Boise, Idaho.

.....Clerk.

Filed.....

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IN THE

United States Circuit Court of Appeals

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a Corporation, and Alexander LEWIS,

Appellees.

BRIEF OF APPELLANT.

Upon Appeal from the District Court of the United States, in and for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

S. T. SCHREIBER and
ALFRED FRASER,
Attorneys for Appellant,
Residence: Boise, Idaho.

Filed.....

.....Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

MANUFACTURERS TRUST COMPANY,
a Corporation, and Alexander LEWIS,

Appellees.

BRIEF OF APPELLANT.

Upon Appeal from the District Court of the United States, in and for the District of Idaho, Southern Division.

STATEMENT.

This is an appeal from an Order or Judgment of Dismissal, (Tr. 134), made on the 13th day of June, 1938 in the United States District Court for the District of Idaho, Southern Division.

The case was originally brought in the District Court of the Third Judicial District in the State of Idaho, in Ada County at Boise, on the 8th day of February, 1937, and is an action in fraud, by reason of wrongfully and fraudulently leasing and optioning for sale, certain mining and mineral property in Gem County, Idaho, known

as the LINCOLN MINES, to the appellant, by one, Alexander Lewis of New York, who was not, and never has been the owner of said property (Tr. 1-2-3-4-and 5).

It is also alleged that a corporation engaged in general business and banking in New York City, State of New York, to wit: The Manufacturers Trust Company, a foreign corporation, doing business in the State of Idaho, is the true and lawful owner of the said property and is joint defendant, and at all times was and is the owner, and doing business in the State of Idaho without complying with the laws of the State, relative to foreign corporations doing business in the State.

The appellant alleges that he made large expenditures and improvements upon said property, and purchased machinery and mining equipment and placed thereon to mine the premises, did pay out sums of money as royalties on the productions of the mine to the said Alexander Lewis, and the said Alexander Lewis, with knowledge, acquiescence, and assistance of the officers and agents of the Manufacturers Trust Company, collusively and fraudulently withheld the true state of title from the plaintiff until approximately February 15, 1934, when plaintiff discovered to his surprise that the said Alexander Lewis was not the real owner, did not have the title and could not make title to plaintiff in any event, and at which time the agents, officers, and attorneys of the said Manufacturers Trust Company, a corporation, informed plaintiff that they would not convey said property to him, and demanded that he forthwith deliver up possession, to his damage in

the sum of approximately Five Hundred Thousand Dollars, ($500,000.00).

Service upon the defendant, Manufacturers Trust Company, a corporation, was obtained through the service of summons and complaint upon the Auditors of Ada and Gem Counties, Idaho, respectively, (Tr. 7-8-9-10-and 11; and acknowledged by the Vice President of said service (Tr. 11) is in evidence. The service on Alexander Lewis was obtained subsequently by registered mail, (Tr. 38 and 39).

On the 27th day of February, 1937, one day before the expiration of time for appearance, the defendant, Manufacturers Trust Company, through its Attorneys, served and filed a Notice, (Tr. 12 and 13), and a *Motion to quash* (Tr. 19-20-and 21) *the Summons and Complaint*, accompanying said motion with a Petition (Tr. 13-14-15-and 16), and a Bond for Removal (Tr. 17-18-19) to the Federal District Court of the United States in the Southern District of Idaho, Southern Division, at Boise. The notice to the plaintiff was, that the matter be presented on March 4, at ten A. M. or as soon as counsel may be heard by the Honorable Charles F. Koelsch, Judge of said Court, and prayed for an order approving said bonds, and removing said cause to the District Court of the United States.

The appellant filed his Objection to Allowance for Removal (Tr. 22) and supported the same by Affidavits, (Tr. 23-24-25), and on the hearings, March 4, Appellees

filed counter Affidavits (Tr. 26-27-28) and after argument by respective counsel upon the Motion to Quash and the Objections to Removal (Tr. 29) and as by Minutes of the Court (Tr. 28-30) is shown, the case, nevertheless, was removed on the 18th day of March, 1937.

MOTION TO REMAND.—

On March 30, 1937, the appellant filed a motion to remand the cause to the State Court, which motion is set out in the record, (Tr. 31-32-33). The motion was supported by Affidavits of James Baxter, President and General Manager of the Baxter Foundary and Machine Works, Fermin J. Arnould, an employee of the Baxter Foundary and Machine Works, J. W. Crowe, Division Manager of the Idaho Power Company at Boise, (Tr. 34-35-36-&-37) and the Affidavit of Truman Joiner, Certified Public Accountant at Boise, Idaho, (Tr. 40-41), and on the same day the Affidavit of Service obtained upon Alexander Lewis, through the Auditor of Gem County, (Tr. 38 & 39).

On April 14, 1937, the said cause upon the motion to remand, came on for hearing, (Tr. 42), and on April 15, 1937, after said hearing before the court, appellees filed a GENERAL POWER OF ATTORNEY, amending the Bond filed in the State Court, (Tr. 43-44-45-46), and on April 16, 1937, the court denied said motion to remand (Tr. 46), to which Appellant filed Exceptions, (Tr. 47), and on April 22, 1937, the same were allowed; subsequently, on April 27, 1937, upon notice by appellant, RENEWAL OF MOTION TO REMAND TO THE

STATE COURT, (Tr. 49), was filed, supported by the Affidavit by counsel for plaintiff-appellant, (Tr. 50-51), and on May 4, 1937, after same had been presented, by counsel for appellant and argued by counsel for respective parties, the court denied the motion (Tr. 52), and appellant filed his Bill of Exceptions, and the same was allowed by the Court on May 10, 1937, (Tr. 52-53).

On June 2, 1937, and more than thirty days having elapsed after the removal from the State Court, and no AFFIDAVIT OF MERITS OF DEFENSE, and no pleadings, answer or demurrer having been filed since the removal, the appellant filed his Praecipe for Default, (Tr. 53), and on the same day the Default of the defendants-appellees, was entered by the Clerk, (Tr. 52-54), and on July 6, 1937, appellant filed his motion to make the Default final, (Tr. 54-55).

No further action was taken in said cause until August 6, 1937, when the defendants-appellees, filed separate motions for the Manufacturers Trust Company and Alexander Lewis, respectively, to set aside the default, (Tr. 55-56-57-58-59-60-61-62-63-& 64), as is fully set out.

On September 13, 1937, the Motions to set aside the Default of the Manufacturers Trust Company and Alexander Lewis were presented to the Court by O. W. Worthwine, Esq. of Hawley & Worthwine, on the part of the defendants-appellees, and S. T. Schreiber, Esq. on the part of the plaintiff-appellant; and on September 30, the

said matter was further presented by respective counsel (Tr. 65-66), and the matter in all things was taken under advisement by the Court, and on October 5, 1937, the said court rendered its opinion and made an *Order vacating and setting aside the Default against defendants-appellees,* and second, *quashed the Service of Summons and Complaint, therein.*

On October 5, 1937, upon rendering its opinion, the Court further erred in the quashing of the Service of Summons and Complaint, in inferentially holding the action as a *separable controversy, and quashing the Summons and Complaint against both appellees.* Appellant, therefore, reserves his exceptions and filed the same as of October 20, 1937, and on October 21, filed his Notice and Motion to Reconsider Order Overruling Motion to Remand, (Tr. 74-75-76), supported by the affidavit of Robert W. Clark, (Tr. 77-78-79), and on January 5, 1938, the Motion for Reconsideration of the overruling of appellant's motion to remand, the case was heard before the court, and after argument by respective counsel for both parties, the court denied appellant's motion for Reconsideration, and again appellant reserved his exceptions to said rulings, and on January 7, 1938, appellant filed his exceptions to said rulings (Tr. 80-81) which were approved on said date. This left the case pending in the Federal Court for almost one year.

On February 7, 1938, the Clerk issued process from the Federal Court and again on February 8, 1938, another summons was issued by the Clerk of the Federal Court

upon an Order to Perfect Service, supported by an Affidavit, made by the Honorable Judge, C. C. Cavanah, (Tr. 86-87-88-&89), under the federal statute; and following on March 16, 1938, another summons was issued and served by the United States Marshal, (Tr. 90-91) upon the Auditor of Gem County, Idaho, as is shown by the return thereof, supported by the Affidavit of Lillian M. Campbell, Clerk of the District Court, Gem County, Idaho, (Tr. 91-92).

On March 23, 1938, appellee, Manufacturers Trust Co., by its Attorneys, Hawley & Worthwine, came into Court and filed a motion to quash service of summons and complaint which had been issued by the Clerk of the Federal Court upon Order, (Tr. 93-94) and on April 8, 1938, upon notice to the defendant-appellee's Attorneys, to determine Motion to quash service of Summons and Complaint, *and for a Default by reason of appellee's failure to answer or plead to the appellants complaint, and for want of a* sufficient affidavit of defense, were filed by appellant, as of April 8, 1938, (Tr. 96-97-98), and upon the affidavit of April 15, 1938 of William I. Phillips in Opposition to Motion to quash, (Tr. 100-101-102-103-&-105), and the affidavit of J. A. Jones, Auditor in the office of the office of the State Insurance Fund of the State of Idaho, (Tr. 105), and the Supplemental Motion, (Tr. 114-115-116-117-118), filed by the Manufacturers Trust Company as of April 16, 1938, and the Affidavit of Lester R. Bessell of New York, and James L. Fozard, of the same place, (Tr. 118-119-120-121-122-123-124-125), the pend-

ing motions were reset for hearing by the Court at 10:00 o'clock April 22, 1938, and upon the evidence submitted and the Exhibits to wit:—plaintiff-Appellant's death certificate of Alexander Lewis, (Tr. 99), and the deed, (Tr. 105-106-107-108-109-110), and the exhibit's Nos. 1, 2, 3, & 4, being the royalty checks of theAmerican Smelting & Refining Company, paid by Phillips to the defendants-appellees on the property, (Tr. 110-111-112-113), were introduced in evidence at the hearing, and at the conclusion of the arguments, the court took the motion to quash under advisement, but denied the motion for the entry of default; and on May 5, 1938 rendered opinion (Tr. 127-128-129), and ordered the motion of the Manufacturers Trust Company, a corporation, to quash the service of summons and complaint on it granted, to all of which rulings of the court, the appellant took exceptions and lodged the same on May 10, 1938, (Tr. 130-131), and on May 12, 1938, the court revised and approved the said exceptions, and the exceptions were filed on said date.

On June 11, 1938, motion to remand the case to the State Court was filed by counsel for appellant, (Tr. 132-133), based upon the records and files in the case, and the law in the particular case: *and on June* 13, 1938, *the case came up for final hearing.* The motion being presented by counsel for appellant, and after some argument, defendants-appellee were permitted by the Court to argue the case in opposition thereto, to which appellant's counsel objected; and on the self-same day, June 13, the court in harmony with its Memorandum Opinion, filed on May

5, upon the records and files, and the proofs heretofore presented, refused to remand the case to the State Court, but nevertheless, declared that it was without Federal Jurisdiction to proceed further with the case, and *ordered said case be dismissed with judgment for costs to the defendant-appellee, Manufacturers Trust Company,* (Tr. 134)—:

TO WHICH ORDER the plaintiff-appellant filed his Bill of Exceptions on June 21, 1938, (Tr. 135-136), praying that said Bill of Exceptions be signed, allowed and approved, and made a part of the record, pursuant to the rules and practice in such case, made and provided and which was accordingly done.

Upon oral notice of appeal, a proposed, compiled Bill of the Exceptions in said cause was fiiled on August 5, 1938, and presented to the Judge for settlement, and amendments and objections thereto having been filed by the defendants-appellees, the same was presented to the court for settlement and by the court denied, (Tr. 136-137-138).

The sections of the code particularly applicable to the case is Judicial Code 28, as amended, and 37, 28 U. S. C. A. 71, 80.

ASSIGNMENTS OF ERROR.

1. That the Court erred in assuming jurisdiction of the cause in the first instance, on removal from the State Court to the Federal Court, and in denying the motion to remand.

2. The Court erred in his judgment of October 5th, 1937, in setting aside the default of defendant, Manufacturers Trust Company, and in quashing the service of summons and complaint in the action.

3. The Court further erred in denying the motion of plaintiff filed on the 11th, day of June, 1938, to remand said action to the State Court of the Third Judicial District of the State of Idaho, in and for Ada County from which it was removed for trial.

4. And the Court erred *in dismissing* the action on June 13, 1938 after the Statutes of Limitations, preventing the filing of a new action, had run, thereby depriving plaintiff of enforcing his demands against defendants.

5. And erred in rendering judgment for cost to defendants.

POINTS AND AUTHORITIES.

I.

Where the bond for removal originally filed with the petition for removal, the latter being filed, in time, was defective and *was amended after the time for removal had expired,* the amendment was too late to effect removal.

Webb et al. vs. Southern Ry. Co., 248 Fed. 618
Wilcox & Gibbs etc., Sewing Mach. Co. vs. Follett et al, 29 Fed. Case No. 17, 643.

Alexandria National Bank vs. Willis C. Bates Co. 160 Fed. 839.

Lee vs. Continental Ins. Co. 292 Fed., 408.

Case would be remanded to State Court where case was removed to Federal Court, after defendant submitted case to State Court and secured adjudication on question of validity of service of process.

Chin vs. Foster-Milburn, 195 Fed., 161.
Bragdon vs. Perkins-Campbell, 82 Fed., 338.
Guernsey vs. Cross, 153 Fed, 827.
Seager vs. Maney, 13 Fed. Sup., 617.

Where application for removal of cause to said court was resisted, County Circuit Court could inspect record to determine whether the cause was removable.

In re: Law (1936) 186 A. 528.

State Court has right to pass on sufficiency of petition and bond for removal of cause to Federal Court, and cannot be deprived of jurisdiction unless they are sufficient under law.

Standard Oil Co. Inc. et al. vs. Decell, (1936), 166 Southern 379.

State Court has jurisdiction to determine questions of law raised by petition for removal, and in so doing, to construe in connection therewith plaintiff's pleadings.

Thompson vs. Pan-American Petroleum Corp., 169 S. E. 270.

Question of removability of cause from State to Federal Court is in first instance for State Court's determination.

Cyc. Fed. Pro., Vol. 1, Section 172.

McCarter vs. American Newspaper Guild, (1935) 177 Atl. 835.

Statutory requirement in respect to pleading within thirty days after filing certified record, applies only to party removing cause from State Court.

S. A. Lynch Enterprise Finance Corp. vs. Dulion, 45 Fed. 2d 6.

A State Court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer.

Wm. Stone vs. State of S. Carolina, 117 U. S. 430, 29 L. Ed., 962.

Removal cannot be effected unless all the parties of the controversy unite in the petition.

Hyde vs. Ruble 104 U. S. 497, 26 L. Ed. 823.

Chicago Rock Island & Pac. Ry. Co. vs. Martin, 178 U. S. 245, 44 L. Ed. 1055.

If the State Court had properly acquired jurisdiction in a method authorized by law (State Law) and not repugnant to the Federal Constitution or laws, or natural justice, the Federal Court on removal will recognize such jurisdiction and *the process by which it was obtained.*

Clark vs. Wells, 203 U. S., 164 51 L. Ed. 138.

Boise Flying Ser. Inc. vs. Gen. Motors Accept. Corp, 55 Idaho 5; 36 Pac. 2d. 813.

It was the State Court's duty to examine not only the pe-

tition, but the rest of the record in determing whether a sufficient case was presented for removal.

Missouri K. & T. Ry. Co. vs. Chappell, 206 Fed. 688.

The removal Statute cannot be so construed as to permit a defendant to oust the rightful authority of a State Court by removal, and then obtain a dismissal of the action in the Federal Court for want of jurisdiction.

Wells vs. Clark, 136 Fed., 462.

Where a non-resident defendant invokes the judgment of the State Court by motion to set aside the service of Summons and Complaint, he is concluded by the Court's decision and cannot renew the motion in the Federal Court.

Bragdon vs. Perkins-Campbell Co., (Supra).

Seager vs. Maney 13 Fed. Sup., 617.

A case involving but a single controversy cannot be removed.

Ex parte—Abraham Wisner, 203 U. S. 449.

Foreign Corporation—Doing Business.

By engaging in business within limits of States where such Statute is enforced, the Corporation will be regarded as thereby voluntarily submitting to the territorial jurisdiction of its court, subject only to the right of removal.

Lincoln Mine Oper. Co. vs. Manuf. Trust Co. et al, 17 Fed. Sup. 499.

Wade on Notice, Sec. 1303.

Ojus Mining Co. vs. Manuf. Trust Co. et al., 82 Fed. 2d. 74.

For a corporation to be doing business in a State sufficient to make it amenable to process of Court, all that is required is that enough business be done to enable the Court to say that corporation is present in the State.

I. C. A. 5-507 Sub. 3.

Boise Flying Ser. Inc. vs. Gen. Motors Accept. Corp. 55 Ida. 5.

A statutory provision against the acquisition and holding of real property by a foreign corporation, cannot be evaded by the property being conveyed to a trustee, or by purchasing the Charter and Franchise of a domestic corporation as a mere device to conceal the real ownership of property.

Fletcher Cyc., Sec. 8364.
U. S. vs. Forwarding Co. Ltd. et al., 8 Fed. Sup., 647..

There can be no question that a foreign corporation is suable in tort in a state in which it is doing business in which the tort was committed.

Fletcher Cyc. Sec. 8797.

Farmers & Merchants Bank of Cattleburg, Ky. vs. Fed. Reserve Bank in Cleveland, 286 Fed., 566.

Smolik vs. Pa. & R. Coal & Iron Co., 222 Fed., 148.

Again the mere agent of such foreign corporation cannot be permitted to take title in himself to the use and benefit of such corporation. Such transaction would be palpable evasion of the statutes.

Donaldson vs. Thousand Springs Co., et al. 29 Ida. 735 162 Pac. 334.

See:—Re-statement of the Law of Agency, Vol. 1, Page 569.

II.

PLEADING SUBSEQUENT TO REMOVAL:—

The said copy of the transcript being entered in the United States District Court within thirty days, the parties so removing said cause, shall within thirty days thereafter, plead, answer or demur to declaration or complaint in said cause, and the cause shall then proceed in the same manned as if originally commenced in the Federal Court.

Jud. Code Sec. 29 (Compiled Statutes 1011.)

Wena Lumber Co. vs. Continental Lumber Co. 270 Fed. 795.

Virginia Bridge & Iron Co. vs. U. S. Shipping Board Emg. Fleet Corp. 300 Fed., 249.

Rule 94 U. S. D. C. for Idaho.

When a corporation comes into Court with an attack on the service of process, they must inform the party seeking service how a better service can be made and this information must come from some one authorized to speak for it.

Bushnell vs. Kennedy 76 U. S., 736.

Hill vs. Morgan 9th Ida., 718 76 Pac. 323.

In tort action—Interlocutory Judgment is necessary:—

City of Guthrie vs. T. W. Harvey Lumber Co., 50 Pac. 84.

Ross vs. Noble, 6 Kans. Appeal 361., 51 Pac. 792.

Haley vs. Eureka County Bank, 21 Nev. 127. 26 Pac. 64. 12 L. R. A., 815.

Creagh vs. Equitable Life Assoc., 88 Fed., page 1.

Boston & M. R. R. vs. Breslin, 297 U. S. 715 80 L. Ed. 1000 80 Fed. 2d, 749.

Existence of cause of action is determinable by law of State where injury occurs and the law of the State where the action is brought determines whether the action is *Joint or Several.*

Donaldson vs. Tuscon G. E. L. & P. Co., 14 Fed. Sup 246 (1935).

McFarland vs. B. F. Goodrich Rubber Co., et al, 47 Fed. 2d 44.

Watson vs. Chevrolet Motor Co. 68 Fed. 2d, 686.

Generally one must recover in tort action under law of place where tort was committed.

Geryer vs. Western Union Tel. Co. 93 S. W. 2d, 660.

U. S. vs. Pac. Forwarding Co. Ltd., 8th Fed. Sup 647 (Wash. D. C.)

Non-resident defendants cannot litigate part in State Court, and then remove to litigate another part, and the time for filing petition for removal is not tolled by filing motion to quash.

Miller vs. Troy Laundry Mach. Co. 2d Fed. Sup., 182.

Germania Ins. Co. vs. Wis. 119 U. S. 473 30 L. Ed. 461.

In a joint action against several non-residents defendants in which no separable controversy is presented, all of the party defendants must join in the removal. This is

true whether removal is sought on the ground of diversity of citizenship when no separable controversy exists, or because of Federal question involved.

Simpkins Fed. Prac. Sec. 1161.

Chesapeake & Ohio R. R. Co. vs. Dixon, 179 U. S. 121.

Again in action of tort which might have been brought against many persons or against anyone or more of them and which is brought in State Court against all jointly, contains no separable controversy which will authorize its removal, etc.

Jud.Code, Sec. 28 28 U. S. A. Sec. 71.

Torrence vs. Shedd 144 U. S. 530, 36 L. Ed. 531.

Forrest vs. Southern Ry. Co. 20 Fed. Sup 851.

Doubtful issues of law and fact must be tried in the court which had jurisdiction, and are not determined in removal proceedings.

Huffman vs. Baldwin et al, 82 Fed. 2d, page 5.

On removal of cause to Federal Court, Court takes case as it then is, and does not review rulings made by the State Court within State Court's jurisdiction while cause was pending in State Court.

McDonnell vs. Wasenmiller, 74 Fed. 2d. 320.

Duncan vs. Gegan et al., 101 U. S., 25 L. ed. 875.

Hoyt vs. Ogden Portland Cement Co., 185 Fed. 889.

After the denial by State Court to quash and set aside the service of summons and complaint, there can be no

renewal of the motion in Federal Court without leave to do so, either from State or Federal Court.

Allmark vs. Platte S. S. Co., 76 Fed. 615.

Where a foreign corporation is doing some substantial business in a State, and a suit commenced under the Statutes is removed, if the service was valid under the State law, Federal Court will not set aside the service.

Sleicher vs. Pullman Co. et al, 170 Fed. 365 (Applicable to Affidavits).

Hudson Navi. Co. vs. Murray 233 Fed. 466. (1916 C. N. J.).

A default admits the cause of action, and material and traversable averments of the declaration, although not the amount of damages.

Willson vs. Willson 57 Am. Dec. 320.

Slater vs. Skirving 66 Am. St. Rep. 444.

Appearance:—

The motion to quash in the State Court was a general appearance, notwithstanding the endeavor of defendants to limit it to a specialty.

R. S. Shaw vs. Martha Martin, 20 Idaho, 168 117 Pac. 853

State law governs as to what constitutes a general appearance

Hireen vs. Interstate Transit Lines et al, 52 Fed 2d 182.

Delaney vs. U. S. 77 Fed. 2d 916 (1935).

If the judgment be entered on failure to plead, or file an affidavit of defense, but the amount is undeterminable, the judgment is only interlocutory until the amount is determined.

Whitaker et al vs. Bramson Fed. Case No. 17, 526, 2d Paine 209.

Where a motion to set aside the service of process had been previously made and denied in the State Court, it was held that the Federal Court must follow such decision.

Hoyt vs. Ogden Portland Cement Co., 185 Fed., 889.

Whether an appearance is special or general, is determined by the relief sought.

C. J. Vol. 4. 1317,
Jenkins vs. York Cliffs Imp. Co. et al, 110 Fed. 807.
Crawford vs. Foster, 84 Fed., 939 28 CCA 576.
Mahr vs. Union Pac. R. Co., 140 Fed., 921. (Affirmed by 9th Circuit CCA), 170 Fed., 699.
Automatic Toy Corp. vs. Buddy "L" Mfg. Co. 19 Fed Sup 668. (NY 1937).

If a party wished to insist upon the objection that he is not in Court, he must keep out for all purposes except to make that objection.

Pittinger vs. Al G. Barnes Circus, 39 Ida 807.
Lowe vs. Stringham 14 Wis. 222.
Manning vs. Furr, 66 Fed. 2d. 807. (CCA).

The Courts, in an unbroken line of decisions, say generally that any action on the part of a defendant except to object to the jurisdiction over his person, which recog-

nized the case, as in court, amounts to a general appearance.

Hammond et al vs. Dist. Court of N. Mex. 228 Pac. 758.

Fowler vs. Continental Casualty Co., 17 N. Mex. 188, 124 Pacific, 479.

Dailey et al vs. Foster, 17 N. Mex., 377, 128 Pac. 71.

The defendants having filed their motion to set aside the default, therefore, entered and made a general appearance in this action.

Mandel Bros. vs. Victory Belt Co., 15 Fed 2d, 610 (CCA)

Feldman Investment Co. et al vs. Conn. General Life Ins. Co., 78 Fed. 2d, 838 (CCA).

If a defendant seeks to enter a special appearance and in his motion sets up further jurisdictional and non-jurisdictional grounds, it amounts to a general appearance, and the fact that it is denominated a special appearance in the motion avails nothing.

Nichols & Shepard Co. vs. Baker, 73 Pacific 302.

The pendency of a motion directed to the summons, complaint, or answer, shall enlarge the time to answer or demur, as the case may be, until the decision upon such motion and such time thereafter as may at the time of such decision be allowed; PROVIDED that, such be accompanied with a certificate of an Attorney of this court that he believes the motion well-founded in point of law, and that it is not interposed for delay.

Rule No. 25, U. S. District Court for the District of Idaho.

Hughes Fed. Practice, Section 12, 365.

Where a defendant in challenging jurisdiction on the ground of invalid process, or its services, goes further and raises an issue on the merits of the case stated in the bill, he thereby voluntarily waives the defects, if any, and enters his general personal appearance.

Foster Fed. Pract. 6th Ed., Section 1689.
Jones vs. Andrews, 10th Wall 327.
Hudson Navi. Co. vs. Murray, 233 Fed., 466

In a suit against a number of defendants, charged with having obtained property by fraud or conspiracy, such is not a separable controversy, and cannot be removed by one defendant, viz., (Manufacturers Trust Company).

McGowan vs. Williams et al, 10 Fed., Sup. 168 (1935).

A cause removed on the ground of separable controversy should be remanded at any stage at the instance of any party, or on the courts own motion whenever the absence of a separable controversy appears.

International & G. N. R. R. Co. vs. Hoyt, 70 S. W. 1012.

The erroneous assumption of jurisdiction in a removed cause may work serious hardship.

Fitzgerald vs. Missouri Pac. Ry. Co. et al, 45 Fed., 812 28 U. S. C. A. Sec. 344 B. (Jud Code 237.)

Every court has inherent power not depended upon the Statutes to control, vacate, or correct its own decrees in interest of justice.

Freeman on Judgments Sects. 200-222.

Ill. Printing Co. vs. Electric Shovel & Coal Corp. 20 Fed. Sup., 181, (Aug. 1937).

It is the duty at all times and at any time during the pendency of a suit to remand the case upon the fact appearing by affidavit or petition for removal, that the case has been improperly removed to the Federal Court.

Cameron vs. Hodges, 127 U. S. 322. —1154.
Rosebaum vs. Bauer, 120 U. S. 743.
Ayres vs. Wiswall, 112 U. S., 693.

Where a removed cause is taken to the Circuit Court of Appeals by Writ of Error, (Appeal now), it is the duty of the Court on its own motion to determine whether the record exhibits a removal cause, regardless of whether any objection was taken to the jurisdiction on the appeal.

Rife et al vs. Lumber Underwriters, 204 Fed. 32.
Fred Macey Co. vs. Macey, 135 Fed., 725.

Whether a District Court acquired jurisdiction of a cause by removal, until it sustained its jurisdiction by overruling, a motion to remand, cannot be determined by the appellant court on an appeal in ancillary suit.

Mestre, Atty. Gen et al vs. Russell, 279 Fed. 44.

III.

Whether the finding is general or special, the rules of the Court during the progress of the trial, if duly excepted to at the time and presented by Bill of Exceptions, may be reviewed.

Generes vs. Campbell, 11 Wall 193. 20 L. Ed. 110

While there is no appeal from an order to remand, a decision denying motion to remand is reviewable.

Houlton Savings Bank vs. Am. Laundry Machinery Co. 7 Fed. Sup 858.

Wrightville Hardware Co., vs. Hardware & Woodware Mfg. Co. et al. 180 Fed. 586.

Refusal to remand may be reviewed on appeal from final judgment.

Ruff vs. Gay 67 Fed 2d. 684.

Employers Re-Insurance Corp. vs. Bryant 299 U. S. 373.

Although a non-resident who was not personally served in the State Court could not be considered a party for the purpose of removal, this would not be grounds for dismissing the cause in the Federal Court, but only for remanding to the State Court.

Richmond vs. Brookings, 48 Fed. 241.

The Court having denied plaintiff's motion to remand to State Court, had inherent power during term to relieve plaintiff therefrom.

Leonard vs. St. Joseph Lead Co. et al 75 Fed. 2d, 390.

IV.

Process—Quashed:—

Where service of process issued out of Federal Court had been quashed because defendant was not within the territorial jurisdiction of Court, but dismissal of suit would prevent plaintiff from refiling suit within time permitted by State Statute to make service and decide issues.

28 Jud. Code, as amended, Sec. 27; 28 U. S. C. A. Sec. 71-80.

Employers ReInsurance Corp. vs. Bryant U. S. Dist. Judge., 299 U. S. 373. 82 Fed. 2d. 373.

Error committed—Suit was for conspiracy—by non-r esident, and was non-separable controversy, and was not removable by one defendant.

McGowan vs. Williams et al 10 Fed. Sup, 168.

The question of jurisdiction of the Circuit Court is properly presented in a case removed from State Court, where plaintiff's motion to remand on ground that case was not properly removed, is denied and final judgment is given against him on his opposing the jurisdiction and refusing to prosecute the action.

Powers vs. Chespeake & O. Ry. Co. 169 U. S. 673.

Again this duty to remand cannot be affected by the fact that there is no apparent cause of action stated, this is for the State Court to determine.

Broadway Ins. Co. et al vs. Chicago G. W. Ry Co. et al, 101 Fed., 507.

Ayers. vs. Wiswall 112 U. S. 187 28 L. Ed. 693.

Evidence received informally by affidavits and correspondence files, without production of witnesses, but without objection, must be considered on appeal.

Texas Co. et al vs. Borne Scrymser Co., 68 Fed. 2nd, 104.

The Court below cannot at the instance of a party, eliminate portions of the answers or pleas to the order that the transcript shall be made up without them in view of an appeal at law.

Smith vs. McIntyre et al, 84 Fed., 721.

But if the summons be quashed and another issued, or can be issued and a dismissal follows, the dismissal is a judgment and part of the record.

Teller vs. U. S., 111 Fed. 119.

On appeal at law, the Circuit Court of Appeals should dispose of all the questions and all of the controversies brought to it by the Appeal, in passing on such assignments of error as the appellant has the right to have reviewed all of the separable controversy in a removal case which were brought in with that on which removal was passed.

Maryland Casualty Co. vs. Jones, 73 L. Ed., 960, 27 Fed. 2nd, 521.

The construction of a state statute by the Supreme Court of the state with relation to the suability of a foreign corporation in the courts of such state will be followed by the Federal Court in such State, in determining the jurisdiction of the State Court of a suit under the Statute for the purpose of determining the question of its jurisdiction of the suit on removal.

Lightfoot et al. vs. Atl. Coast Line R. Co. 33 Fed 2d, 765.

Court, in a removal suit not rightfully in Federal Court, had positive duty to order remand.

Jud. Code, Sec. 37 U. S. C. A. 80.

Turmine vs. West Jersey and Seashore R. Co. 44 Fed. 2d. 614.

A district court's refusal to remand cause to the State Court if erroneous is revieable by Circuit Court of Appeal, ordinarily after final judgment, but also in connection with a reviewable interlocutory order.

Jud. Code, Sec. 37, 28 U. S. C. A. 71, 80.
Schell et al, vs. Food Machinery Corp. 87 Fed 2d, 385.

DISMISSAL:—

A dismissal of a case ordinarily stands on the same footing as a judgment at law, and will be presumed to be final and conclusive unless the contrary appears in the proceedings or decree of the court:

Durant vs. Essex Co. 7th Wall 109; 19 L. Ed. 156.
Fowler vs. Osgood v. L. R. A. (N. S.) 824.; 141 Fed. 24.

So, in all cases, when the objection does not go to the merits of the case, the judgment of dismissal should always be *without prejudice.*

Baker vs. Cummings, 181 U. S. 125; 45 L. Ed. 780.
American Surety Co. vs. Choctaw Const. Co. 135 Fed. 487.
Swan Land & Cattle Co. vs. Frank, U. S. 612. 37 L. Ed. 580.

When a bill is dismissed for want of jurisdiction, the court cannot decree costs.

Neel vs. Penn Co. 157 U. S. 153; 39 L. Ed. 654.
Citizens Bank vs. Cannon, 164 U. S. 324; 41 L. Ed. 453.
Westfeldt et al vs. N. Carolina Mining Co. 100 CCA 552. 177 Fed. 132.

Phoenix & Buttes Mining Co. vs. Winstead, 226 Fed. 863.

ARGUMENT

Assignment No. 1

"That the Court erred in assuming jurisdiction of the cause in the first instance, on removal from the State to the Federal Court, and in denying the motion to remand."

Under Judicial Code 28 amended, Section 71, and Judicial Code 29, Section 72.

The petition for the removal of the case from the State Court to the United States Court, was presented and the State Courtgiven an opportunity to act. The right to remove a suit from a State Court to the Circuit Court of the United States is statutory and to effect a transfer of Jurisdiction, all the requirements of the statute must be followed. The purpose of the Statute is that the adverse party shall be advised of the intention to file such petition and bond in order that he may have an opportunity to appear in the state court and resist its removal, if he so desires Appellant most vigorously protested at the hearing, (Tr. R. 22), and we believe now, that it is very apparent that error was committed, and the district court of the United States did err in assuming jurisdiction. Court then, for the sole purpose, should have heard and remanded the case immediately.

Lee vs. Continental Ins. Co., 292 Fed. 408.

Where a foreign corporation is sued in a state court, moved to quash the service of summons and complaint on

the ground that it was not doing business in the state, and the process was not served on an agent representing it in its business, and submitting affidavits in opposition to the return of the service, establishing prima facie evidence of legal service, the decision of the State Court that it acquire jurisdiction over the foreign corporation by reason of the service, was conclusive on the corporation, and it could not re-litigate the question in action in the Federal Court on the subject rendered against it by the State Court.

It is well settled by the statute providing that a motion to quash service of summons and complaint is deemed a general appearance. Appellees in their motion to quash in the prayer thereto, particularly moved *that the purported summons and complaint on defendant, Manufacturers Trust Company be quashed,* (Tr. -R. 21.).

After submitting the case to the state court and securing an adjudication on the validity of service of process, it was to late to remove the case, and the United States District Court should have remanded it.

Seager vs. Maney, 13 Fed. Sup. 617.

In the same case, this language is used. The record or a copy thereof is now filed in this court, and the defendant has petitioned this court to set aside the service made on defendant. The defendant is therefore asking to have this court pass upon questions which the Court of Common Pleas of Bradford County has adjudicated. One of the purposes of the Federal Removal Statute, Judicial

Code, Section 29, 28 U. S. C. A., Section 72, is to avoid such a situation as this, by requiring a removal petition to be filed before *any defense* is made in the state court so that the federal court has the entire un-adjudicated case before it, and can adjudicate every part of the case in the same manner, as if it had been originally commenced in the federal court; for on removal of cause into the federal court, that court takes it precisely as it receives it, accepting such decrees and orders of the state court as adjudicated, and will not entertain a motion which has been fully presented and finally decided by the State Court before removal.

Guernsey vs. Cross, 153 Fed. 827.

The State Court has right to pass on the sufficiency of petition and bond for removal to Federal Court. The giving of notice of intention to remove, is only for the purpose of giving the court, and parties to the suit, an opportunity to examine the sufficiency of the petition and bond, and does not operate as a transfer of jurisdiction from the State to the Federal Court.

28 U. S. C. A. Sec. 72; Notes 302-325-326-371.

In no case can the right of removal be established by a petition to remove, which amounts simply to a traverse of the facts alleged in plaintiff's petition, and in that way undertaking to try the merits of a cause of action good upon its face.

Thompson vs. Pan-American Petroleum Corp. 169 S. E. 270.

It is obviously not the purpose of the removal statute to destroy a valid jurisdiction of the state court, nor is it the purpose to secure to a defendant the right to litigate in the district of his own domicile, since the removal must be to the United States Court for the District wherein the suit was begun. A removal cannot be effected unless all the parties of the controversy unite in the petition, and it was the state court's duty to examine not only the petition, but the rest of the record in determining whether a sufficient case was presented for removal,

Missouri K & T R. R. Co. vs. Chappell, 206 Fed. 688.

Nor, can the removal statute be so construed as to permit a defendant to oust the rightful authority of a state court by removal, and then obtain a dismissal of the action in the federal court for want of jurisdiction.

Wells vs. Clark, 136 Fed 462.

If the State Court had properly acquired jurisdiction in a method authorized by law, (State Law,) and not repugnant to the Federal Constitution, or laws, or natural justice, the federal court on removal will recognize such jurisdiction and the process by which it was obtained.

In Crowley N. P. R. R. Co., 159 U. S. 583; 40 L. Ed. 263, the principal which was clearly stated; the case having been removed to the federal court upon the defendant's petition, it does not lie in its mouth to claim that the court has not jurisdiction of the case unless the court from which it was removed had no jurisdiction.

The Idaho Statute under which service was made, is as follows:

> "Section 5-507, Sub. 3, whenever any foreign corporation, not a resident, a joint stock company, or association, shall not have any designated person actually residing in the country in which said corporation or joint stock company shall be doing business in this state upon whom process can be served as provided in Sec. 29-502, of the Code, or when the agent of such Company as provided in the said Section, shall have removed from, or ceased to be a resident, or cannot after due diligence be found within the county where the action arose, or conceals himself in order to avoid the service of process, then service of such summons shall be made upon the County Auditor of said County, with like effect as though said service were made upon an agent or person appointed and designated as provided in Sec. 29-502, and it shall be the duty of such Auditor to forward a copy of such summons so served on him, by registered mail, to the principal business office of such corporation, in this State, if the address of such office be known to him, but no failure on the part of such Auditor to mail such copy of summons shall effect the validity of the service thereto."

In the instant case, the service was obtained on the Auditors of both Ada and Gem Counties, respectively. The service upon thecorporation was sufficient and so recognized by it, in admission of the service as by the Transcript of the Record, at pages five to eleven, incl. is shown, and by the appearance of the Attorneys for the defendants in court.

A similar statute in the State of Louisana directed, all foreign corporations doing business in the State to ap-

point an agent upon whom process should be served, and provided that if the corporation failed to make an appointment, service might be made upon the Secretary of State. The defendant not having appointed any such agent, Simon served his process on the Assistant Secretary of State in an action arising upon a tort of the defendant committed within the State of Alabama. The ground of the decision was that the consent of the corporation arose from its doing business within Louisiana, must be limited to actions arising out of the business done within the State. The same rule was laid down in Old Wayne Life Assoc. vs. McDonough, 204 U. S. 8; 51 L. Ed. 345.

Where a non-resident defendant invokes the judgment of the state court by motion to set aside the service of summons and complaint, he is concluded by the court's decision, and cannot renew the motion in the Federal Court.

Bragdon vs. Perkins-Campbell Co. 82 Fed. 338.

The right of removal is purely statutory and one seeking the benefits of the statute must comply with its essential provisions. A notice of intention to remove is the first step in the procedure, and pleading in some form is the last. The requirement to plead may not be mandatory or jurisdictional in the sense that it may not be waived by the parties or extended by the court; but it is an essential step necessary to be taken by the defendant before the cause shall then proceed in the same manner as if it had originally been commenced in the U. S. District court. There has been no such extension or waiver here.

The courts say whether to allow the defendant to plead

after the expiration of thirty days, or to remand the cause, is a matter that calls for the exercise of a sound legal discression; wherefore, it is that the statute may not be disregarded with impunity, and failure to comply with it without any satisfactory excuse, renders the cause subject to remand.

Wena Lumber Co. vs. Continental Lumber Co. 270 Fed. 795.

Again, a case involving but single controversy cannot be removed.

Ex-parte Wisner, 203 U. S. 449.

In the case of Watson vs. Chevrolet Motor Co. of St. Louis, 68 Fed. 2d 686, th court says:

> "Where the complaint in an action of tort, reasonably construed, charges concurrent negligence, the controversy is not separable, the question is to be determined by the condition of the record in the State Court where the removal petition is filed; the cause of action is whatever the plaintiff, by his pleading, declares it to be; and matter of defense furnish no grounds for removal."

Judge Cooley in his work on Torts, Third Ed. 247 says:

> "The weight of authority, will, I think, support the more general proposition that where th negligence of two or more persons concur in producing a simple, indivisable injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action."

That the Manufacturers Trust Company, was at all times cognizant of everything that was being done, by its

agent or trustee, Alexander Lewis, joint defendant, there can be no doubt, and that there is just a joint tort, can neither be questioned. The case however, was removed upon the petition of the Manufacturers Trust Company alone, (Tr. -R 13-14-15-16).

The *Motion to Remand* of plaintiff-appellant, was filed on March 30, 1937, (Tr. R. 31-32-33), supported by affidavits of James Baxter, Firmin J. Arnould, J. W. Crowe, Lillian M. Campbell, Auditor of Gem County, and Truman Joiner, supporting facts on the position taken by appellant, that the corporation was doing business within the State.

On April 15, and before said Motion to Remand was presented, Attorneys for defendant filed an amended bond for the Manufacturers Trust Company, Appellee, and in effect, conceded the discrepancies and deficiencies pointed out by appellant on his Objection to Allowance of Petition for Removal, (Tr. -R.22). At this point, it may be observed, that the authorization to the Attorneys for appellee to sign any bond in its behalf, was not made in New York until March 2, 1937, so that no valid bond had, or could have been filed when the time to plead by appellees had expired, which was February 28, 1937, (Tr.-R. 26-27). The presentation of a proper petition and bond to the State Court is a jurisdictional pre-requisite.

Wm. Stone vs. South Carolina 117 U. S. 430; 29 L. Ed. 962.

All these matters were presented in the Motion to Re-

mand, in the first instance, to the court, and which Motion to Remand, the Court denied and immediately thereafter, the plaintiff renewed his motion and again the same overruled.

Upon the Renewal Motion to Remand of April 27, 1937, the plaintiff particularly stressed the point that not all of the defendants had joined in the removal, and that more than thirty days had elapsed and no pleading, answer or demurrer to the declaration or complaint having been filed as provided by statute, Jud. Code, Section 29, Compiled statute, Sec. 1011, and as amended, (Tr. -R.49).

After the removel and the filing of the Transcript in the U. S. District Court, it was the duty of the defendants to plead, answer or demur within 30 days to the declaration or complaint, at which time the cause should then proceed in the manner as if originally commenced in the Federal Court. No pleading, however, of any kind, or answer was ever filed by the appellees, and on June 2, 1937, the plaintiff-appellant took a Default, and on July 6, 1937, filed a motion to make the Default final, by reason of no answer, plea, or demurrer, or Affidavit of Defense, (Tr.-R. 54-55).

Assignment No. 2.

The Court erred in his judgment of October 5th, 1937, in setting aside the default of defendant, Manufacturers Trust Company, and in quashing the service of summons and complaint in the action.

On August 6, 1937, more than sixty days after the Default entered by the appellant, the appellees came into court and filed two separate motions to set aside the default, (Tr. R. 55-56-57-58-59-60-61-62-63-64). These motions were sworn to by the Attorneys for the appellees and sought again in their motions to appear specially. The state law of Idaho governs as to what is a special appearance.

In the case of Pittinger vs. Al. G. Barnes Circus, 39 Idaho, page 807, the courts say: The rule to be observed by a defendant relying upon a special appearance to attack the jurisdiction of the court is well stated in Lowe vs. Stringham, 14 Wis. 255, where the court said: "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes, except to make that objection."

In the case of Mahr v. Union Pacific R. R. Company, 140 Fed. 921, this was a case tried in the Federal Court for the District of Washington and the decision therein was affirmed by the Circuit Court of Appeals for the Ninth Circuit; in this case the same procedure was followed as in the case now before this court. In the Mahr case the defendant filed its motion to quash the service of summons, and the plaintiff filed its motion for a default judgment, and the court here says "As the decision of one, must conclude the other, the two motions will be considered together." Again upon the question of the special appearance in that case the courts say on page 923 as follows:

"The right to make a special appearance in not a substantial one inherently existing; it is a privilege allowed by practice, and it must be exercised under the rules of procedure. Whenever a litigant appears to deny jurisdiction over his person, which would otherwise exist but for the failure to pursue the methods prescribed by law for-bringing him into court, he must confine himself to that particular branch of jurisdiction. It is a matter of indifference to him whether or not the court has jurisdiction over the subject-matter; so long as it has no jurisdiction over his person, it cannot in any injuriously affect his interests. He must therefore, be content to stop with the suggestion that the summons or notice, as the case may be, required by the law to be served, has not been served, and that the court is therefore not entitled to deal with him in the absence of such service. As to whether the court has jurisdiction over the matter embodied in the complaint, he need give himself no concern. If he does, in a transitory action, and enters upon a discussion of that question or makes a challenge as to that point, he waives the want of service and enters voluntarily into a controversy which goes to the merits, and thereby submits to the jurisdiction of the court over his person."

In the motion filed by defendant and above referred to the relief asked was that this court should quash the summons and complaint filed in this action. They did not ask the court to quash the SERVICE of summons and complaint. There is a vast difference between quashing the service of a summons and complaint and quashing the complaint and summons itself. In order to quash the complaint in this action the court would have to assume jurisdiction and decide whether or not there was any legal reason that the summons and complaint should be

quashed. As far as the complaint is concerned, in our opinion, a move to quash the same is practically the same as filing a demurrer thereto, and to quash the summons the court would have to take jurisdiction and examine the summons and see if it was issued in legal form and complied with the laws regarding the same.

If, as we contend, the defendant has made a general appearance in this action, then it is of no consequence whether or not the defendant was doing business in the State of Idaho at any time, or at all, and it is also immaterial whether or not there was any legal servicet or any service at all of the summons and complaint in this action upon the defendants.

The defendant in its said motion to quash, herein referred to, further states as follows "This motion is based upon the records and files in this action, including this motion." The defendant, the court will notice, does not limit itself only to the consideration of those papers in the record which are necessary to be considered in passing upon the question raised by its motion to quash, but it invites the court to consider all the records and files in the action which in effect opens up the whole case for the consideration of the court. (Tr.-R. 64).

Again in a recent case to wit: In Manning vs. Furr 66 F. 2nd 807 (CCA) the court says, "It is true that the defendant undertook to appear specially for the purpose of challenging the service of summons upon him, but in addition to these grounds he included the ground of

'other matters apparent on the face of the record'. The 'other matters' there referred to must necessarily apply to matters in addition to those stated in relation to the service of summons upon him. Such an assignment searches the entire record. It may serve as a general demurrer to the bill of particulars, also as a challenge to the jurisdiction of the court. As a consequence of this, it must be held that the defendant entered his appearance to the merits of the case. In the above case the court also states "It is elementary that: 'A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived the objection' ".

The motion to quash the writ or service, whatever the cause, should go no further than raise the special objection to the form of the writ or irrigularity of the service.

American Gasoline Co. vs. Commerce Trust Co. 20 Fed. 2nd 46 (CCA).

The Courts in an unbroken line of decisions say, generally that any action on the part of a defendant except to object to the jurisdiction over his person, which recognized the case as in court, amounts to a general appearance:

Hammonds vs. Dist. Court, 228 Pac. 758.

Fowler vs. Cont. Casualty Co., 17 N. Mex 188; 124 Pac. 479.

Guadalupe County vs. District Court, 223 Pac. 517.

And whether an appearance is special or general, is determined by the relief sought.

4 Corpus Juris, 1317.

Crawford vs. Foster, 84 Fed 939; 28 (CCA) 576.

M. & H. Ry. vs. Union Pacific Ry. Co., 140 Fed, 921. (Affirmed by 9th Circuit, CCA, 170 Fed 699).

Under the rules of practice in the Federal District Court, the pendency of a motion directed to the summons, complaint, or answer, shall enlarge the time to answer or demur, as the case may be, until the decision upon such motion and such time thereafter as may at the time of such decision be allowed; PROVIDED that such be accompanied with a certificate of an Attorney of this court that he believes the motion well-founded in point of law, *and that it is not interposed for delay.*"

Rule No. 25, U. S. District Court for the District of Idaho.

Hughes Fed. Pract., Sec. 12,365.

If this rule means what it says, then there is no alternative but the Court should have over-ruled the motion of the defendants in the first instance for the reason that there is no Certificate of an Attorney of this Court, that he believes the motion well founded in point of law, and there is no affirmative showing that it is not for the purpose of delay, and of which the defendants may be rightfully accused, as this case has been before the Honorable Court one year and no showing by the defendants

at any time has been made, setting up a valid defense or any defense at all.

See Rule No. 25, Transcript of the Record, page 154.

The Coupling with a special appearance and objection to the merits raises it to a general appearance and overrules the special appearance.

In Dana vs. Seabright, 47 Fed. 2nd 38, the Court said where a defendant in challenging jurisdiction on the ground of invalid process or its service, goes further and raises an issue on the *merits of the case stated in the bill,* thereby voluntarily waives the defects, if any, and enters his general personal appearance.

In a suit against a number of defendants charged with having obtained property by fraud or conspiracy, such is not a separable controversy, and cannot be raised by one defendant, (as in this instance); and a cause removed on the ground of separable controversy, should be ermanded at any stage, at the instance of any party, or on the court's own motion, whenever the absence of a separable controversy appears; and we believe the court erred.

International & G. N. Ry Co. vs. Hoyle 149 Fed, 180.

The erroneous assumption of jurisdiction in a removed cause may work serious hardship, (as in case at bar). Every court has inherent power not depended upon the statutes, to control, vacate, or correct its own decrees in the interest of justice, and it is the duty at all times, and at any time during the pendency of a suit to remand the

case upon the fact appearing by Affidavit, or Petition for Removal, that the case has been improperly removed to the Federal Court.

Cameron vs. Hodges, 127 U. S. 322.

Rosenbaum vs. Bauer, 120 U. S., 30. L. Ed. 743.

A court has jurisdiction to render a valid judgment against a corporation of a foreign state whenever the corporation appears generally by Attorney, or when legal service has been made upon it according to the laws of the state where the court sits.

March vs. Eastern Ry. Co. 40 N. Ham. 548; 77 Am. Dec. 732.

Boise Flying Ser. Incorp. vs. Gen. Motors Acc. Corp. 55 Ida. 5.

We believe that the default entered on June 2, 1937 was properly taken if the case was properly removed into the Federal District Court by defendants-appellees. If, however, the fact that no proper bond or any bond was filed; and if appellees by their motion, challenging the jurisdiction of the State Court was not a general appearance; and if it was not necessary for the appellees to plead, answer or demur, having removed the case to the Federal Court within thirty days, according to rule; then, we think, the default was improperly taken and the court had a right to set aside the default judgment; but it was error to quash the *summons and the complaint* which the court did after considering the record and files in the case in which necessarily he must have, and did consider matters other than in relation to the service of summons.

While it is true that the appellees challenged the service of summons and complaint, and by every inference that may be gathered from the entire procedure in the case, from the motion to quash in the state court, to and including the final appearance, over objection of counsel on the motion to remand on June 11, 1938, it is evident that they appeared generally. We rever again t the case of Mahr vs. Union Pacific Ry. Co., Supra.

The inconsistancy of the appellees in their contention, is so apparent when considering the Law on Procedure.

If the State Court, as appellees contend, had no jurisdiction, it could not have passed upon the question of removal, and the case could not have been removed.

Cyc. Fed. Pro. Vol 1, Section 72.

And as said, the Federal Court takes only such jurisdiction, had and so acquired, and takes no jurisdiction if the State Court had none.

Wm. Stone vs. State of South Carolina, Supra.

Yet, in their motion of August 6, appellants recite, "That this Honorable Court has never acquired jurisdiction of the specially appearing defendant as appears from the motion to quash the service of summons and complaint on file herein," (Tr.-R. 57). And in their companion motion, (Tr.-R.64), for Alexander Lewis, "This motion is based upon the records and files in the action including the motion."

A defendant not served, and who appears specially in the Federal Court after removal, but filed a demurrer, and

numerous special exceptions and plead to the merits, held to have waived objections to the jurisdiction over his person;

Norris Ins. Co. vs. M. H. Reed & Co. 278 Fed. 19; 237 U. S. 19.

And on the motion of August 6, to set aside the default sworn to by the Attorneys of record for appellees, in each instance, they plead to the merits of the case and have waived objections to the jurisdiction.

The Judge of the United States District Court in his Opinion of October 5, 1938, particularly refers to the filing of the special appearance by the defendants in their motion to quash states: "The mere fact that the State Court entertained the Order or Removal, it did not by so doing, decide the motion of the defendant, Manufacturers Trust Company, to quash the service etc." It must be remembered that the defendants filed their motion to quash the service before a valid bond was filed and therefore the removal was not made before time to answer expired, and this fact is further evidenced by the opposition Objections to Allowance of Petition for Removal, (Tr.-R.22), and the Corrected Minutes of the Court, (Tr.-R.29). The hearing wason March 4, several days after time for answer had expired, and bond could not have been made or filed since authority to sign was not given until March 2, 1938, and that was in New York.

The United States District Court, however, denied the Motion to Remand, which left the case in the Federal Court with the service of the Summons quashed and the

Complaint as well. On October 21, immediately after the rendering of Option, and the filing of exceptions thereto; counsel for appellant filed his "MOTION TO RECONSIDER ORDER OVERRULING MOTION TO REMAND," as is more particularly set out in (Tr.-R. 75-76), and supported further by the Affidavit of Robert W. Clark, which was filed, (Tr.-R.77-78-79).

The Court denied the Motion for Reconsideration on January 5, 1938, and on February 7 and 8, 1938 and March 16, respectively, another summons was issued from the Federal Court, and the same served upon defendant, Manufacturers Trust Company, through the Auditor of Gem County, Idaho, (Tr.-R. 81 to and including 92); and again on March 23, the defendant through its Attorneys, filed a motion to Quash Service of Summons and Complaint. Appellant, then, filed notice to take up and determine said motion, and again filed a Motion for Default by reason of the defendants *failure* to *answer* or *plea* to the plaintiff's complaint filed, and for want of sufficient Affidavit of Defense. (Tr.-R. 96-97-98).

Assignment No. 3.

The Court further erred in denying the motion of plaintiff filed on the 11th day of June, 1938, to remad said action to the State Cour t of the Third Judicial District of the State of Idaho, in and for Ada County from which it was removed for trial.

By referring to the Affidavit on file it is shown beyond

cavil that the MANUFACTURERS TRUST COMPANY has done business and is doing business in the State of Idaho even until now. If then, it is doing business, and as set out by the Martial's retnrn, "That it is a foreign corporation and has not complied with the Constitution and Laws so made and provided, relative to foreign corporations, doing business in the State of Idaho, andthat the said corporation is conducting a mining business in Gem County, State of Idaho, etc," the service required under the Statute was properly made, and when made at the instance and order of this Court upon the Auditor of Gem County, and as is supported by her Affidavit on file, it was amply sufficient

POWER—RESULTING TRUST—TITLE:—

Through this entire case there has appeared a salient effort by the defendants in which they deny responsibility for their acts, and it may occur to the Court that a situation arises by reason of the dereliction of the parties themselves, which may result in law creating a "naked power" in ALEXANDER LEWIS, and then again, it may create a resulting trust.

If the affidavit of James L. Fozard contains any truthful statements, pertaining to the acquirement of the mining property, in the first instance, and we believe it may be conceded that the MANUFACTURERS TRUST COMPANY, did in the inception of the negotiations in 1923, pay the purchase price and was the rightful owner, and at the time took the title in the name of their em-

ployee, ALEXANDER LEWIS, that a simple dry trust was created and the nature of the trust in not being described in the muniment of title, the deed, from Hutchings and Richards to Alexander Lewis, left the same to construction or law. In such a case cestui que trust is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyence of the legal estate as he might direct. In short, the cestui que trust has an absolute control over the beneficial interest, together with a right to call for the legal title and the person in whom the legal title vests, is a simple or dry trustee.

Perry on Trusts, 5th Ed. Sec. 520, says: "Settlors sometimes convey estates in this manner for an ulterior purpose, or an active trust having been accomplished, the legal title andthe beneficial interest may have fallen into this condition. The duties and powers of such dry trustees of the legal estate are few and simple. They're usually to be threefold: First, to permit the cestui que trust to occupy and receive the income and profits of the estate; Second, to execute such conveyance or make such disposition of the estates as the cestui que trust may direct; Third, to protect and defend the title or to allow their names to be used for that purpose. In a simple trust of this nature, the dry trustee has no power of managing or disposing of the estate. It is further to be remarked that there can be but few of these dry trusts, for where there is no control and no duty to be performed by the trustee, it becomes a simple use, which the Statute Of

Uses executes in the cestui que trust and it thus unites both the legal and beneficial estate.

Referring to the deed of Hutchings and Richards to Alexander Lewis, it will at once be seen that a trusteeship was contemplated for the benefit of the corporation, Manufacturers Trust Company, and that the interest of Alexander Lewis was a naked power. Deed, (Tr.-R. 105 to 110), also the Affidavit of James L. Fozard, (Tr.-R. 121 -to 125).

Corporations are creatures of the law, and they cannot exercise powers not given them by their Charters or Acts of Incorporation for this reason: They cannot act as trustees in a matter in which they have no interest or in a matter that is inconsistent with, or repugnant to the purpose for which they were created; nor can they act as trustees, as they are forbidden to take and hold lands unless complying with the Statutes and Laws in the State in which they seek to acquire the same; and as said in the Donaldson Case, 29 Idaho 754, from the Syllabus, Sec. 10 of Art. 11 of the Constitution, and Sec. 2792 of the Revised Codes, as amended, Session Laws 1915, 270, prohibits the taking of title *by an agent of a foreign corporation, in his own name,* and for and on behalf of such a corporation, or a trustee appointed by such corporation for that purpose, as effectively as it prohibits the corporation itself from taking such title. This absolutely prevented theManufacturers Trust Company, through its trustee, or by itself, to convey title of any kind to a cor-

poration to property in this state and equally prevented the Holding Company from receiving title and as shown in the Affidavit of William I. Phillips, quoting the testimony of J. Lawrence Gilson, Vice President of defendont, Manufacturers Trust Company, on page 103 of the Transcript, "Patents were applied for in the name of Alexander Lewis, but were actually for the benefit of the Manufacturers Trust Company; and all expenses and costs were paid for by the Manufacturers Trust COMPANY *was the real party in interest.*"

On May 5, 1938, the Honorable Court in his Opinion stated the sole question remaining for decision on the motion to quash service of summons and complaint, as the other questions presented at the same time were disposed of from the bench, is, "Was the Manufacturers Trust Company organized under the laws of New York, doing business in the State of Idaho when the attempted service was made on February 5,, (should have said March 16, 1938), upon the Auditor of Gem County?" It seems in this particular that the court had in mind that in order for service to be effectual, the corporation must have been doing business at the time of the service. Of course, this assumption is incorrect, the theory is that the corporation transacted business within the State and committed the tort, though it had not complied with the Laws of the State relative to doing business within the State, if it had entered the State without complying with the provision of the law, it will be deemed to have assented to any valid terms prescribed by the commonwealth as a

condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter the commonwealth and there assert its compliance.

In Baltimore & Ohio Ry. Co. vs. Harris, 12 Wall 65 the question was as to the jurisdiction of the Supreme Court of the District of Columbia in a suit against a corporation in Maryland, whose railroad entered the District without consent of Congress. This court said, "The corporation cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be procured by the law of the place. One of these conditions may be that it shall be sued, and if it does business, it will be presumed to have assented, and will be bound accordingly. A foreign corporation cannot do business in Idaho without subjecting itself to the jurisdiction of our courts, but it is not a necessary corollary that it is entitled to claim a residence. In addition, it cannot escape the consequences of an illegal act done by its agents within the scope of the authority, conferred upon them by claiming existence under a foreign government. It is laible to be sued here, the same as an individual or company incorporated under the laws of the State.

Austin & Wife vs. R. R. Ry. Co., 25 N. J. L. 381.

By referring to the record, and the exhibits in evidence to wit: The deed, the death certificate of Alexander Lewis Exhibit No. 5, (Tr.-R. 99), and the Checks, Exhibits Nos. 1, 2, 3, and 4, (Tr.-R. 110-111-112-113); it

will be seen that the appellee, through its *dry trustee,* Alexander Lewis, was doing business, and receiving the revenue therefrom, as alleged in plaintiff's complaint, and that its officers resided without the State of Idaho.

Garrett vs. Pilgrim Mines Co. 47 Idaho 595; 277 Pac. 567.

Assignment No. 4.

And the Court erred in dismissing the action on June 13, 1938, after the Statutes of Limitation, preventing the filing of a new action had run, thereby depriving plaintiff of enforcing his demands against defendants.

Referring particularly to the defendant, Alexander Lewis, not being served in the second instance by the process issued from the Federal District Court, for the very reason that the defendant was dead, yet no suggestion of such fact was made by Attorneys for Appellee, defendent Lewis, having died September 4, 1937, (Tr. R. 99).

Although a non-resident who was not personally served in the State Court could not have been considered a party for the purpose of removal, even that would not be sufficient grounds for dismissing the case in the Federal Court, but only for remanding to the State Court.

Richmond vs. Brookings, 48 Fed. 241.

The Court having denied plaintiff's motion to remand to the State Court had inherent power during the term to relieve plaintiff therefrom. Having quashed the services of the summons and complaint in the State Court, and having refused to remand the case at least three times

upon motion, and having ordered a summons and complaint served upon defendants from the Federal District Court, he had inherent power in the last instance to remand the case to the State Court from which it had been removed erroneously and where services of process issued out of Federal Court has been quashed because defendant was not within "Territorial Jurisdiction" of the court, it was not only plaintiff's right to have the case remanded it; and especially so when as in the specific case the court was informed that the Statute of Limitations had about expired and that a refiling of a new action within the time permitted by Statute could not be made, the Court erred *in dismissing the case,* instead of remanding to the State Court which had jurisdiction to parfect service, and decide issues.

Ruff vs. Gay 67 Fed. 2nd 684.
Leonard vs. St. Poseph Lead Co. 75 Fed. 2nd 390.

A very late and instructive case, parallel to the one at bar, in re: Employers Reinsurance Corp. 82 Fed. 2nd 373; 299 U. S. 325, we quote, "*Quashing of service of process, issued out of Federal District Court, because defendant was not within territorial jurisdiction of court, did not require dismissal of action where court had general jurisdiction.*"

"*Where service of process, issued out of Federal District Court had been quashed because defendant was not within territorial jurisdiction of court, but dismissal of suit would prevent plaintiff from refiling suit within time permitted by state statute, court properly remanded case to state court having jurisdiction to make service and decide issues.*"

Jud. Code, 27 as amended; Sec. 27; and 28 U. S. C. A. 71, 80).

Section 80, title 28 U. S. C. A.

"If in any suit commenced in a district court, or removed from a State Court to a district court of the United States, it shall appear to the satisfaction of the said disrict court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

"The quashing of service did not require a dismissal as the court had general jurisdiction of the case. Conceding that process of the court could not run out of the district, with the quashing of the second service, the court *was without power to enter judgment.* Upon remand, the state court, under the law of Texas would have authority to make service anywhere in the state and jurisdiction to decide the issues. If the suit were not remanded, plaintifi would never be able to *enforce his demand,* no matter how just, without the voluntary appearance of defendant. The actions of defendants so far indicate no intention of ever voluntarily appearing. *The federal court may not be used to perpetrate an injustice."*

At this point we wish to call the courts attention that on hearing of the final motion to remand, after the case had been pending in the Federal Court for over a year and

three months, during which time the defendants-appellees had filed no demurrer or answer, but in each instance objected to remanding the case, and the court not acting otherwise, placed the appellant in a very pecular and precarious position. He could not dismiss the case of his own motion, and protect himself by re-filing a new action in the State Court, or the Federal Court, and he could not proceed. He did, however, in each instance upon the hearing of the court, and ruling therein, reserve his exceptions, as the record will show, and filed his bill of exceptions which included affidavits and entire records and files in case, which court had considered, and are the Record. (Tr.-R. 47-52-73-80-130 & 131-135).

Rule 94 of the United States District Court, (Tr.-R. 157), was called to the courts attention several times, and in the finalty ,as appears by the Transcript of the Record, 134; the *final order, and judgment was made which we believe was error*s

At the hearing, counsel for appellant objected to the appellees appearing in opposition to the final motion, and to their argument, for the reason, as he maintains, they were not further concerned, and were no longer before the court.

In re: Employers Reinsurance Corp. (Circuit Court of Appeals, 5th Circuit, Supra).

Assignment No. 5.

And erred in rendering judgment for cost to defendants.

A dismissal of a case stands on the same footing as a judgment at law, and will be presumed to be final, and conclusive, unless the contrary appears in the proceedings, or decree of court:

Durant vs. Essex Co., 7th Wall 109; 19 L. Ed. 156.

A district Court's refusal to remand cause to the State Court, if erroneous, is reviewable by Circuit Court of Appeals, ordinarily, after final judgment, but also in connection with a reviewable interlocutory order::

Jud. Code, Sec. 37; 28 U. S. C. A. 80.

Schell et al vs. Food Machinery Corp. 87 Fed. 2d, 385.

So, in all cases, when the objection does not go to the merits of the case, the judgment of dismissal should always be without prejudice.

Baker vs. Cummings, 181 U. S. 125; 45 L. Ed. 780.

Swan Land & Cattle Co. vs. Frank, 148 U. S. 612. 37 L. Ed. 580.

When a bill is dismissed for want of jurisdiction, the court cannot decree costs.

Citizens Bank vs. Cannon, 164 U. S. 324: 41 L. Ed. 453.

Phoenix & Buttes Mining Co. vs. Winstead, 226 Fed. 863.

Where it appears that the defendant in error procured the removal of the case from the State Court upon a record which fails to support the jurisdiction of the Federal Court, the judgment may be reversed with directions to

remand, and defendant in error will be condemned to pay the costs, both of the court below and the Appellate Court.

Neel vs. Penn Co. 157 U. S. 153; 39 L. Ed. 654.

In conclusion, we most sincerely urge, that the Circuit Court of Appeals, as stated in Maryland Casualty Co. vs. Jones, 297 U. S., 792; 73 L. Ed. 960, will dispose of all the questions and all the controversies brought to it by the appeal, and in passing on such Assignments of Error as the appellant has a right to have reviewed, per adventure the default judgment in the Federal Court may be re-instated, and if not, a reversal of the case be made in toto, and proper order.

Respectfully submitted,

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ALFRED FRASER,

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Residence, Boise, Idaho.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY, a corporation, and ALEXANDER LEWIS,

Appellees.

BRIEF OF APPELLEES

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

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.....Clerk.

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STATEMENT

It is difficult to orderly answer Appellant's brief since its POINTS AND AUTHORITIES do not succinctly state the questions involved or required by Rule 24 of this court. We will do our best to divine the points involved and answer accordingly.

CHRONOLOGICAL STATEMENT

This action was originally commenced in the Ada County Idaho District Court on February 8, 1937 (Tr. 1).

The Ada County Sheriff returned "personal" service on appellee by leaving copy of summons and complaint

with the Ada County Recorder February 8, 1937 (Tr. 7). The Gem County Recorder was similarly served February 10, 1937 (Tr. 8).

Removal to the United States District Court for Idaho, Southern Division, was sought by the appellee on February 27, 1937 (Tr. 13). Bond on removal was filed at the same time (Tr. 17).

Motion to quash service was simultaneously filed by appellee (Tr. 19).

Appellant filed in the State Court its objections to removal March 3, 1937 (Tr. 22). The State Court, on argument of motion to remove, but not on the motion to quash service, ordered removal March 19, 1937 (Tr. 29-30).

After removal appellant moved to remand March 30, 1937, setting forth seven grounds therefor (Tr. 31).

Argument on this motion was had April 14, 1937 (Tr. 42).

An unusual procedure—a removal of motion to remand —was filed April 27, 1937, by appellant (Tr. 47-50). This was argued and denied on May 4, 1937 (Tr. 52).

On June 2, 1937, a Praecipe for default was filed by the Appellant notwithstanding pendency of motion to quash. A deputy Clerk entered default on appellee and co-defendant, Alexander Lewis on June 2, 1937 (Tr. 54).

On June 6, 1937, motion to make the default judgment final was filed without service on appellee (Tr. 54-55).

Later, and on August 6, 1937, appellee moved to set

aside the default (Tr. 55-57). A similar motion was filed for defendant, Alexander Lewis (Tr. 59-65).

These motions were argued on September 13, 1937 and again on September 30th—in this latter argument the motion to quash service in the State Court was also argued (Tr. 66).

On October 5, 1937, the court set aside the default and also sustained the motions to quash service (Tr. 66).

The lower court filed a written opinion on this decision (Tr. 67-70).

The Appellant then on October 21, 1937, filed a motion to reconsider the order overruling the motion to remand (Tr. 74-77), which had been made April 16, 1937 (Tr. 46). On January 5, 1938, the lower court denied this motion (Tr. 80).

Thereafter the appellant attempted service, issuing summons and complaint out of the lower court on February 7, 1938, which was served on the County Recorder of Gem County, Idaho, (Tr. 82).

On February 8, 1938, another summons was issued and served by the Marshall and returned without service (Tr. 85). On the same date appellant filed an affidavit for order to perfect service, and in accordance with that the lower court ordered summons issued (Tr. 86-89).

Then on March 16, 1938, another summons was issued and return showed service on the County Recorder of Gem County with her certificate showing she mailed a copy of summons on February 14, 1938, to defendant, Alexander Lewis, and on March 2, 1938, to defendant,

Manufacturers Trust Company in New York (Tr. 89-92).

On the 23rd day of March, 1938, the appellee moved to quash service of summons and complaint served on February 9, 1938, upon the County Recorder of Gem County, Idaho, (Tr. 93-96).

On April 8, 1938, the appellant moved for a default against the appellee for failure to answer (Tr. 97-98) and on April 16, 1938, the appellee filed a supplemental motion to quash service of summons and complaint in order to include the purported service made on the 2nd day of March, 1938, and also the purported service made on the 5th day of February, 1938 (Tr. 114-117).

On April 22, 1938, the motion to quash service was argued as well as the appellant's motion to enter default—the latter was immediately denied (Tr. 126).

On May 5, 1938, the lower court sustained the motion of defendant, Manufacturers Trust Company, to quash service of summons and complaint (Tr. 130)—it rendered a written opinion on this occasion (Tr. 127-129).

On June 11, 1938, the appellant moved to remand to the State Court (Tr. 132-133). The court on June 13, 1938, denied the motion and dismissed the case (Tr.133-134).

POINTS AND AUTHORITIES.

I.

THE CASE WAS PROPERLY REMOVED TO THE FEDERAL COURT AND ERROR WOULD HAVE RESULTED HAD IT BEEN REMANDED.

Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 Fed. (2d) 196.

Gray v. Oregon Short Line R. Co., 37 Fed. (2d) 591.

Herbert v. Roxana Petroleum Corp., 12 Fed. (2d) 81.

Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284.

II.

APPELLANT CLAIMS WAIVER IN THE STATE COURT BY APPELLEE SUBMITTING THE QUESTION OF VALIDITY OF SERVICE.

Central Deep Creek Orchard Co. v. C. C. Taft & Co., 34 Idaho 458, 202 Pac. 1062.

Charis Corporation v. St. Sure, 94 Fed. (2d) 353 (9 CCA).

Hardness v. Hyde, 98 U. S. 476, 25 L. Ed. 237.

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 75 L. Ed. 1244.

Cyc. of Federal Procedure, Sec. 1229, p. 549.

III.

AFTER REMOVAL DEFAULT FOR FAILURE TO APPEAR WAS ENTERED BUT WAS RIGHTFULLY SET ASIDE BECAUSE THE APPELLEE'S MOTION TO QUASH SERVICE FILED IN THE STATE COURT WAS PENDING AND WHILE THAT MOTION DID NOT CONSTITUTE GENERAL APPEARANCE IT WAS SUFFICIENT APPEARANCE TO PREVENT DEFAULT.

Central Deep Creek Orchard Co. v. C. C. Taft & Co., 34 Idaho 458, 202 Pac. 1062.

Dahlgren v. Pierce, 263 Fed. 841.

Cain v. Commercial Pub. Co., 232 U. S. 124, 58 L. Ed. 122.

Garvey v. Compania Metaulurgica Mexicana, 222 Fed. 732.

Higgins, et al. v. California, etc. 299 Fed. 810.

Cyc. of Federal Procedure, vol. 2, p. 211.

Bramwell v. Owen, 276 Fed. 36.

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517.

Rorick v. Stilwell (Fla.) 133 So. 609.

McGinness v. McGinness, 68 Atl. 768 (N. J.)

Virginia Joint Stock Land Bank v. Kepner, 7 N. E. (2d) 562 (Ohio).

IV.

THE APPELLANT CONTENDS THAT APPELLEE WAS PROPERLY SERVED AND THEREFORE THE FEDERAL DISTRICT COURT ERRED IN QUASHING THE SERVICE.

Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492.

Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345.

Chipman v. Jeffery Co., 251 U. S. 373, 64 L. Ed. 314.

Toledo R. & Light Co., v. Hill, 244 U. S. 49, 61 L. Ed. 982.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113.

Golden, et al. v. Connersville Wheel Co., 252 Fed. 904.

Patterson et al. v. Shattuck Arizona Carpet Co., 210 N. W. 621.

Bank of America v. Whitney Bank, 261 U. S. 171, 67 L. Ed. 594.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 69 L. Ed. 634.

Creager v. P. F. Collier & Son, Inc., 36 Fed. (2d) 783.

Boise F. Service v. General M. Accept. Corp., 55 Idaho 5, 36 Pac. (2d) 813.

Hurley v. Wells-Newton Nat. Corp. (D.C.), 49 F. (2d) 914, 917.

Eastern Products Corp. v. Tennessee Coal, Iron & R. Co., 170 N. Y. S. 100, 101.

Hansen v. American Security & Trust Co., 144 N. Y. S. 839, 840.

Hexter v. Day-Elder Motors Corp., 182 N. Y. S. 717, 718, 720.

Keokuk & Hamilton Bridge Co. v. Curtin-Howe Corp. (Ia.), 274 N. W. 78, 83 (Syll. para. 3).

Mason v. Red River Lumber Co. (D.C.), 21 F. Supp. 438.

Wollman v. Newark Star Pub. Co., 179 N. Y. S. 899.

V.

THE APPELLANT COMPLAINS THAT WHEN IT SOUGHT TO REMAND THE CASE AFTER THE MOTIONS TO QUASH HAD BEEN SUSTAINED, THE LOWER COURT DISMISSED INSTEAD OF REMANDING.

28 U. S. C. A., para. 80, sec. 37.

In re Employers Reinsurance Corp. (CCA 5), 82 Fed. (2d) 373; 299 U. S. 374, 81 L. Ed. 289.

Reynolds v. Page, 35 Cal. 296.

MINOR POINTS.

28 U. S. C. A., Section 37, paragraph 80.

Kelly v. Alabama-Quenelda Graphite Co., 34 Fed. (2d) 790.

Hunt v. Pearce, 284 Fed. 321.

Bowles v. H. J. Heinz Co., 188 Fed. 937.

ARGUMENT

I.

THE CASE WAS PROPERLY REMOVED TO THE FEDERAL COURT AND ERROR WOULD HAVE RESULTED HAD IT BEEN REMANDED.

DEFECTIVE BOND.

The rather confusing setup of the appellant's brief causes us to suggest that this point covers the removal procedure and the motion to remand of March 30, 1937, (Tr. 31), and the renewal thereof filed April 27, 1937, (Tr. 47), but does not cover the entirely separate motion to remand made by the appellant on June 11, 1938.

The claimed fault in the bond lies in the failure of the appellee to sign it (Tr. 15). The answer is that the appellee's attorney signed the bond and stated he was so authorized. Later, and before the case was removed, that authority was formerly verified by the appellee (Tr. 26).

If the bond were defective for such a reason, it was subject to amendment.

Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 Fed. (2d) 196.

Gray v. Oregon Short Line R. Co., 37 Fed (2d) 591.

However, the bond given was ample protection—it

bound the undertaking Surety Company and it was a compliance with the statute even had the appellee not signed it.

Herbert v. Roxana Petroleum Corp., 12 Fed. (2d) 81.

Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284.

II.

APPELLANT CLAIMS WAIVER IN THE STATE COURT BY APPELLEE SUBMITTING THE QUESTION OF VALIDITY OF SERVICE.

The claim that the State Court considered the motion to quash is simply a misstatement—the State Court never considered that motion—it was not presented to it and was not determined by it (Tr. 29-30). Judge Cavanah so stated in one of his opinions (Tr. 69).

The filing of the motion to quash service of summons and complaint (Tr. 21) was a special appearance and did not constitute submission to the State Court's jurisdiction.

Central Deep Creek Orchard Company vs. C. C. Taft & Co., 34 Idaho 458, 202 Pac. 1062:

"While a motion to set aside a judgment, which is invalid for want of jurisdiction of the person of the defendant, based solely on such lack of jurisdiction, does not operate as a general appearance or cure the defect of jurisdiction, yet the authorities are agreed that a motion which proceeds not only on the ground of want of jurisdiction of the person, but joins therewith any nonjurisdictional ground, is a general appearance * * *. A motion in a cause based wholly on

an alleged want of jurisdiction is not an appearance generally, or waiver of any irregularity in the proceedings by which a party is attempted to be brought into court * * *.

The substance of appellant's motion, and the character of the relief asked for therein, are only to be regarded in determining the question whether its appearance was special or general. It is clear that appellant's sole purpose was to challenge the jurisdiction of the court over it, and the relief sought is in no way inconsistent with a want of such jurisdiction."

Charis Corporation vs. St. Sure, 94 Fed. (2d) 353. (9C.C.A.)

Harkness vs. Hyde, 98 U. S. 476, 25 L. Ed. 237.

Baldwin v. Iowa State Traveling Men's Ass'n., 283 U. S. 522, 75 L. Ed. 1244.

Cyc. of Federal Procedure, Sec, 1229, p. 549.

The Appellant cites the case of Shaw v. Martin, 20 Idaho 168, 117 Pac. 853 (App. br. 22), to the point that a motion to quash is a general appearance. However, in that case the motion to quash also sought a dismissal of the case and prayed that the complaint be stricken from the files. Thus it "demands relief which could only be granted in an action already pending."

The motion here concerned is especially limited to quash the purported service and asks no other relief whatever; it does come within the rule which the Idaho court laid down, and which seems to be followed by many states, that where other relief is sought than the quashing of the summons the court is therefore called upon to do more than determine jurisdiction; the asking for relief which

could only be had by the courts assuming jurisdiction, does waive jurisdictional objection.

In the Idaho case a general demurrer had been filed which waived jurisdiction and it was on this theory that the learned Idaho Justice Ailshie agreed with the majority, although disagreeing as an academic matter with its holding that a motion to quash, even coupled as it was with a prayer for other relief, constituted a general appearance and submission to jurisdiction.

III.

AFTER REMOVAL DEFAULT FOR FAILURE TO APPEAR WAS ENTERED BUT WAS RIGHTFULLY SET ASIDE BECAUSE THE APPELLEE'S MOTION TO QUASH SERVICE FILED IN THE STATE COURT WAS PENDING AND WHILE THAT MOTION DID NOT CONSTITUTE GENERAL APPEARANCE, IT WAS SUFFICIENT APPEARANCE TO PREVENT DEFAULT.

Through inadvertance of a Deputy Clerk the default of appellee was entered. The appellee appeared specially and asked that the default be vacated solely on the ground that no jurisdiction existed to enter default because summons had never been served upon appellee (Tr. 55-58). The lower court rendered an opinion holding with the appellee (Tr. 67-72).

The appellant contended that the default was justified notwithstanding the pendency of the motion to quash which had been filed in the State Court and which had

never been presented to or determined by the Federal Court. However, Judge Cavanah clearly held that a motion to quash service was an appearance and prevented default. His opinion above referred to is probably sufficient.

There is ample authority to support this view.

Idaho, in the case of Central Deep Creek Orchard Co. vs. C. C. Taft & Co., supra, had a similar situation and there the court held that the motion to set aside default which presented only the question of jurisdiction was not a general appearance:

> "We think the correct rule, supported by the weight of authority and the better reasoning, is that where there is a proper motion by the defendant pending and undisposed of, it is improper for the plaintiff to take a judgment by default (Atchison, T. & S. F. R. Co. v. Lambert, 31 Okl. 300, Ann. Cas. 1913E, 329, and note at p. 331, 121 Pac. 654), unless the determination of the motion either way could not affect the right of plaintiff to proceed with the cause."

Similar cases are Dahlgren v. Pierce, 263 Fed. 841 and Cain v. Commercial Pub. Co., 232 U. S. 124, 58 L. Ed. 122.

Garvey v. Compania Metaulurgica Mexicana, 222 Fed. 732.

Higgins, et al. v. California, etc. 299 Fed. 810.

Cyc. of Federal Procedure, vol. 2, p. 211.

Bramwell v. Owen, 276 Fed. 36.

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517.

The Motion To Set Aside The Default Was Not A General Appearance

Appellant cites Mandel Bros. vs. Victory Belt Co., 15 Fed. (2d) 610 (CCA) (app. br. 24). There the party moving to set aside the default actually offered a defense on the merits and invoked the jurisdiction of the court to consider other matters than the lack of jurisdiction—in fact, invoked the discretion of the court to set aside the default by pleading excusable neglect. Here appellant offers no ground for discretion—merely confines the motion to lack of jurisdiction—in no way asks the court to consider the merits of the case and use its discretion.

Appellant also cites the case of Feldman Investment Co., et al. vs. Conn. General Life Ins. Co., 78 Fed. (2d) 838 (CCA). That case is even further from the point. There before appearance a motion for an extension of time in which to answer was filed—later a stipulation confessing the bill and allowing time to pay the principal, etc. was filed—all before the default. Manifestly no attempt to appear specially and question only the jurisdiction of the Clerk to enter default was concerned, as is the fact here.

The appellee made no effort to attack the judgment on any ground except jurisdictional failure. What else could it do? If it did not move to set aside default judgment against it would result. If the court had no jurisdiction over appellant such judgment would be void, but how could the lack of such jurisdiction be shown if to question the default for that reason thereby admitted jurisdiction?

Other cases which uphold the Idaho rule adopted in the case of Central Deep Creek Orchard Co. v. C. C. Taft & Co., supra, are:

Rorick v. Stilwell (Fla.) 133 So. 609.
McGinness v. McGinness, 68 Atl. 768 (N. J.)
Virginian Joint Stock Land Bank v. Kepner, 7 N. E. (2d) 562. (Ohio).

IV.

THE APPELLANT CONTENDS THAT APPELLEE WAS PROPERLY SERVED AND THEREFORE THE FEDERAL DISTRICT COURT ERRED IN QUASHING THE SERVICE.

A number of efforts were made to serve the defendant. The service in the state court was attempted upon the Recorder of Gem County and the Recorder of Ada County. The motion to quash filed in the state court was sustained and as well the motion to reconsider that order. Transcript references:

First motion (Tr. 19-21).
Court's order (Tr. 66).
Motion to reconsider (Tr. 74-77).
Minutes of the court (Tr. 80).
District Court's opinion (Tr. 67-72).

Summons was issued out of the district court February 5, 1938 (Tr. 81) and served on that date by leaving a copy with the Recorder of Gem County. Another summons was issued February 8, returned by the Marshal without service (Tr. 84-85). An affidavit for order to

perfect service filed February 8, and an order for service issued on the same date by the District Judge (Tr. 86-89). Summons issued on the 8th of February was served on the Recorder of Gem County, who sent a copy to the appellee by mail (Tr. 89-91). Motion to quash the service made on the 9th of February, 1938 (Tr. 93-95), supplemented by motion covering purported service on the 2nd of March, 5th of February and the 8th of February (Tr. 114-117).

Whether any service made on the Auditor and Recorder of Gem County or Ada County is sufficient to bring the appellee within the jurisdiction of the District Court is the question involved here.

It is not easy to determine the exact nature of the action as set forth in the complaint (Tr. 15), but at least it is an action in personam and in tort. The wrong committed lies in the assertion that Alexander Lewis fraudulently made an option and agreement in writing in November 1931, representing himself to be the true owner of the mining property, and as a result the plaintiff entered upon the property and made expenditures to his damage. (Tr. 3).

About February 15, 1934, the plaintiff discovered the falsity of the representations and delivered over the property to the defendants on their demand.

The false representations were patently not made within the State of Idaho, and the cause of action, therefore, was one which arose out of fraud in making the false

representations by Alexander Lewis—whether the appellee here took part in the representations is not clear from the complaint.

Judge Cavanah took the view that the alleged cause of action arose outside the State of Idaho (Tr. 127). The complaint alleges that the representations were made November 19, 1931 (Tr. 3). In one of his affidavits appellant states:

> "That the suit and action in this instance is by reason of fraudulent acts committed on or about the 19th day of November, 1931, in which it caused to make and did make void and fraudulent option and lease, and collected royalties upon the premises described in plaintiff's complaint * * *." (Tr. 101).

Appellee was the beneficial owner of the Lincoln group of Mines until February 9, 1932, when it transferred all of its interests to the Huron Holding Corporation, which ever since that time has been the beneficial owner of the property (Tr. 118). The Huron Holding Corporation was not affiliated with or a holding company for the Manufacturers Trust Company, and its stock was independently issued and traded in (Tr. 119). That all of the moneys expended in connection with the operation of the Lincoln Group since the transfer February 9, 1932, have been at the sole expense of and paid by the Huron Holding Corporation and not by the Manufacturers Trust Company (Tr. 119-120). The appellee had no asset or holding in Idaho excepting the beneficial interest in the Lincoln Group (Tr. 121). It acquired that property in the nature of security for a loan to a prospective pur-

chaser (Tr. 121-122). The appellee definitely had no interest in the Lincoln Group and made no expenditures in connection with it after February 9, 1932 (Tr. 124-125).

The appellant from time to time filed affidavits, to which we will make brief reference.

Appellant's affidavit (Tr. 24), a statement of legal conclusion that the appellee is doing business in Idaho—that Lewis is a resident of New York and not a resident of Idaho—upon information and belief the appellee is conducting operations at the Lincoln Group.

Affidavit of James Baxter (Tr. 34-35), simply a statement that employees of the "Lincoln Mines" purchased equipment, and a statement that Berthleson said the equipment was purchased "in the name of one Alexander Lewis, an employee of the Manufacturers Trust, a big corporation in New York, and would be paid for."

Affidavit of Mr. Arnould (Tr. 36-37) to the effect that Berthleson, an employee in the "Lincoln Mines" bought equipment and stated that he acted for Alexander Lewis, an employee of the owner of the property in May, 1933, "the Manufacturers Trust."

Affidavit of J. W. Crowe (Tr. 37) to the effect that electric service was rendered to Alexander Lewis on July 21, 1933.

Affidavit of Truman Joiner (Tr. 40), public accountant, to the effect that Alexander Lewis carried a State Insurance Fund policy.

Affidavit of Robert W. Clark (Tr. 77-79) to the effect that he is a truck driver, delivered timber to the Lincoln Mines, and that a workman, Mr. Turner, said "If they sell the mine I'll be out of a job." Affiant saying, "He meant by 'they,' as nearly as I could learn and understand, the Manufacturers Trust Company."

Affidavit of William I. Phillips (Tr. 86-88), on information and belief alleges that the appellee was doing business in Idaho.

Affidavit of appellant (Tr. 100-104), action was one in tort for damages on account of fraud of appellee and Lewis committed about 19th of November, 1931. A number of immaterial references are made to former testimony of Vice-President of the appellee.

J. A. Jones (Tr. 105), Auditor of the State Insurance Fund, stating that one of its policies covered Alexander Lewis in operation of the Lincoln Mine; certain exhibits attached (Tr. 110-113) showing payments by Smelter Company to Alexander Lewis, endorsed to Manufacturers Trust Company by Lewis, various dates from October, 1932, to April, 1933.

From none of these affidavits does it appear that the appellee was doing business at the time the action was instituted or at the various times service was attempted. Most of the affidavits are entirely beside any point at issue and are mainly conclusions and hearsay. They did not satisfy the lower court that the appellee had any interest in the Lincoln Group or carried on any kind of operations in connection with it after February 9, 1932.

SUBSTITUTE SERVICE ON A COUNTY RECORDER CANNOT BE HAD IN TORT ACTION WHERE THE DEFENDANT IS NOT IN THE STATE AT THE TIME OF SERVICE.

The test in such a case is given in Bank of America v. Whitney Bank, 261 U. S. 171, 67 L. Ed. 594:

> "The sole question for decision is whether at the time of the service of the process defendant was doing business within the district in such manner as to warrant the inference that it was present there."

The rule is well stated in the case of Golden, et al. v. Connersville Wheel Co., 252 Fed. 904, 908, where the court said:

> "In order that proper personal service may be made in a state upon a foreign corporation, it is necessary that such corporation be present in such state at the time of service. As, therefore, the presence of a foreign corporation is manifested only by its carrying on of business there, it must appear, in such a case, that the foreign corporation in question was, at the very time of the service, doing such business in the state where jurisdiction is sought. * * * Service cannot be made an instant prior to the time that the corporation actually begins to do business in the state, so as to show its presence there. Neither can service be made an instant after the corporation has ceased to do business there."

An excellent analysis of cases was made in Creager v. P. F. Collier & Son, Inc., 36 Fed. (2d) 783.

Definitely the Supreme Court has so announced in Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345.

> Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492.

Chipman v. Jeffry Co., 251 U. S. 373, 64 L. Ed. 314.

Toledo R. & Light Co., v. Hill, 244 U. S. 49, 61 L. Ed. 982.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113.

Patterson et al. v. Shattuck Arizona Carpet Co., 210 N. W. 621.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 69 L. Ed. 634.

Appellant started this case in the state court against Lewis—who was never in Idaho and was never personally served—and against the appellee who was the beneficial owner of the Lincoln Group of Mines until Feby. 1932, but not since. Personal service was not had upon the appellee.

When we look at the complaint, we cannot determine exactly what the cause of action is, but giving it the best appellant claims for it, it is a tort action, seeking a personal judgment against appellee because Lewis mis-represented that he was the owner of the Lincoln Group, whereas he was merely naked title holder or trustee, and appellee was really the owner. Just how fraud occurs in this situation is not clear, but appellant states that he believed Lewis when he represented himself as the true owner. Whereupon, he spent large sums in developing the mine and paid out royalties to Lewis and appellee. Having done this, he found out for the first time February 15, 1934, that Lewis was not the real owner, but that the appellee was the real owner and thereupon he surrendered the premises back to both parties, and without stating why he returned the property or in what man-

ner he was defrauded, he alleges that by reason of the fraudulent option and lease he was damaged in the sum of $500,000.00. These fects, we think, fairly appear in paragraph III of the complaint (Tr. 3-4), paragraph IV (Tr. 4), also from appellant's affidavit (Tr. 101).

When he sued in the State Court, Phillips knew that the appellee was not in Idaho, in that it had no statutory agent here or any officers or employees in Idaho—he knew he was after a personal judgment which would not affect the title or ownership of any property in Idaho, and is held to the knowledge that appellee could not be sued outside of the State of New York—at least not in Idaho unless it were actually in the state, for a personal judgment.

It was certainly obligatory upon the appellant to show if it were true that the fraud claimed was committed by the appellee in Idaho. Otherwise, he could not avoid the rule that contracts or wrongs committed outside the state cannot be sued on in the state where the defendant is not in the state at the time suit is brought and service attempted.

Appellant well knew just where and how the fraud was perpetrated on him and could have alleged in the complaint or subsequent affidavits that the false representations on which the suit is based were made in Idaho and the conspiracy occurred in Idaho if those were the facts—Phillips actually made the contracts. Certainly he was obliged to show affirmatively when the question was raised that he had a right to sue outsiders in Idaho.

The burden was upon the appellant to show that the lower court had jurisdiction of his claim against appellee.

The rule is clearly stated in Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8, 51 L. Ed. 345. In the above case the Supreme Court held:

> *"The burden of proof was therefore upon the plaintiffs to show by what authority the Pennsylvania court could legally enter a personal judgment against a corporation which, according to the complaint itself, was a corporation of another state, and was not alleged to have appeared in person or by an attorney of its own selection, or to have been personally served with process."* (Italics ours.)

Hurley v. Wells-Newton Nat. Corp. (D.C.), 49 F. (2d) 914, 917.

Eastern Products Corp. v. Tennessee Coal, Iron & R. Co., 170 N. Y. S. 100, 101.

Hansen v. American Security & Trust Co., 144 N. Y. S. 839, 840.

Hexter v. Day-Elder Motors Corp., 182 N. Y. S. 717, 718, 720.

Keokuk & Hamilton Bridge Co. v. Curtin-Howe Corp. (Ia.), 274 N. W. 78, 83 (Syll. para. 3).

Mason v. Red River Lumber Co. (D. C.), 21 F. Supp. 438.

Wollman v. Newark Star Pub. Co., 179 N. Y. S. 899.

Judge Cavanah correctly analyzed the law in his opinion, (Tr. 127-129).

An excellent analysis of cases was made in Creager v. P. F. Collier & Son, Inc., 36 Fed. (2d) 783.

We find no Idaho case which is precisely in point. However, the Idaho Supreme Court did italicize in the

case of Boise F. Service v. General M. Accept. Corp., 55 Idaho 5, 36 Pac. (2d) 813, in a case cited by appellant (Appellant's Brief 18-46), where service was made on a foreign corporation by serving the County Auditor, as follows, page 16 Idaho report:

> "It is thus made to appear that at the *time* of the commencement of the action, as well as at the *time* of service of summons, and prior thereto, respondent was *present* in this state, transacting business, by and through a local representative * * *."

Appellant nowhere in its brief claims that the tort which is so indefinitely set up in its complaint occurred in Idaho.

Appellant does not claim that Lewis was ever in Idaho or made any representation or option or lease in the State, and the fact is Lewis never was in Idaho (Tr. 60), but made the agreement in 1931 when, of course, he was not in the state (Tr. 124), nor is there any claim that the fraudulent option or agreement was entered into in Idaho or that appellees officers who alone could make such an agreement were ever in this state.

It seems clear to us that the appellee was not present in the state at the time the action was begun, nor since February, 1932, and therefore this case comes squarely within the rule which we have above cited and which was followed by the court below.

V.

THE APPELLANT COMPLAINS THAT WHEN IT SOUGHT TO REMAND THE CASE AFTER THE MOTIONS TO QUASH HAD BEEN SUSTAINED, THE LOWER COURT DISMISSED INSTEAD OF REMANDING.

The lower court, May 5, 1938, quashed the service of summons and complaint (Tr. 130). June 13, 1938, the appellant sought remand of the case to the state court (Tr. 132). After hearing the motion to remand was denied and the case was dismissed.

28 U. S. C. A. para. 80 sec. 37 provides that if, in any suit removed from a state court to a United States District Court, it shall appear to the satisfaction of the federal court that "* * * such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * *" the court shall "dismiss the suit or remand it to the court from which it was removed, as justice may require and shall make such order as to costs as shall be just".

The statute was passed upon in Employers Reinsurance Corp. (CCA 5), 82 Fed. (2d) 373, and on appeal to the Supreme Court, 299 U. S. 374, 81 L. Ed. 289, this comment was made:

> "In the circumstances already recited the district court was required to dismiss the suit for want of jurisdiction or to remand it to the state court from which it had been removed, and in selecting between these alternatives the court was required to act 'as justice may require.' The statute assumes that

> justice will be better served in some instances by a dismissal and in others by a remand. Making the required selection involves discretion—judicial discretion, and mere choice. Plainly the circumstances in which the court acted pointed to a remand as being in justice, the more appropriate of the alternatives."

The facts in that case very clearly afforded the District Court an opportunity to do justice because when the case was filed in the State Court service was made upon an agent of the foreign corporation defendant who was not authorized to receive service. The Federal Court on the defendant's special appearance to quash the service sustained that motion. Thereupon another summons was issued out of the Federal Court and served upon the authorized agent. This time the defendant appeared specially and moved to quash on the grounds that the special agent was in the Western District of Texas while the suit was removed to the Eastern District, and therefore the Eastern District Court did not have territorial jurisdiction of the defendant since the service was made in the Western District. Of course, the Federal Court quashed that service. By this time the statute of limitations had run against the original action and on application of the plaintiff, the court being impressed with the fact that if the case were dismissed a new action could not be started, to save the loss of a right to sue sent the case back to the State Court for the reason that out of the State Court could issue process which could be served upon the agent of the foreign corporation who lived in the Western District of Texas. It was very clear that the State Court had

jurisdiction all over the State of Texas and process issuing out of it could be served either in the Eastern or Western District. There was no question whatever that the foreign corporation was doing business in Texas, and had the plaitiff served the authorized agent, that service would have been good, and by the same reasoning after the Federal Court had found it did not have jurisdiction first, because the person served was not an agent, and then in the second attempt because the Eastern District Court did not have territorial jurisdiction in Western Texas, the case could still be sent back to the State Court and it could issue process which could then be served upon the proper agent of the defendant who lived in Texas. Now in that case there seems to be a real reason for use of the discretion of the Federal District Court, and the defendant certainly could have no real objection because it was actually present in the State of Texas and regular service could be had upon it. If the Federal Court had dismissed the case then because the statute of limitations had run, the plaintiff would have lost its chance to try its case.

Now turning to this case we find that the court decided that service had not been made. If this case had been remanded to the state court, it would have availed the appellant nothing. There was no showing made with the motion to remand that the appellee could be found in Idaho or that conditions changed since the lower court held the defendant was within this jurisdiction. No affidavits or evidence of any kind was brought forward to show

that the appellee could be served, and in the absence of such showing it must be assumed, we believe, that the condition which the court found to exist "absence of appellee from the State of Idaho" continued at the time of the motion to remand and therefore no service could have been had had the case been sent back to the state court.

In this connection we call attention to the fact that the summons was originally issued in the state court in February, 1937, and if it were sent back a new summons that would be issued would be over a year from the date of the commencing of suit in the state court and the issuing of summons therefrom. This cannot be done because the statutes of Idaho, Section 5-502 provides:

> "Issuance of summons.—At any time within one year after filing the complaint the plaintiff may have one or more summons issued."

Under this section a summons may not be issued after the expiration of a year. This has been held under the identical California Act of 1860 from which our Idaho Act was taken. The California Act was amended, but the Idaho Act is the same as the original California Act and has never been amended.

In the case of Dupuy v. Shear, 29 Cal. 238, the question there arose whether a summons issued more than one year after the filing of the complaint constituted the basis of a legal service, and the defendant moved to set aside the summons as improvidently issued and to strike the complaint from the files of the court for want of prosecution. The motion was granted by the lower court and the Supreme Court of California affirmed the decision.

"The summons vacated was issued long after the time limited, and, therefore, not in pursuance of its provisions.

"* * * A summons thereafter to be issued, as a matter of absolute right, must issue by virtue of the provisions of the section as amended, * * *."

The question was again brought up in Reynolds v. Page, 35 Cal. 296, and more pointedly decided. The complaint there was filed on the 20th of August, 1862, and four years afterwards the summons was issued and a motion by the defendant to dismiss was granted. The court said:

"Before the amendment of 1860 (which makes the original California statute of the exact wording of the Idaho statute), the summons might be issued at any time after filing the complaint; but, by the amendment of that year, it could only be issued within a year. It was, doubtless, found that to permit the summons to be issued at any time, without limitation, enabled plaintiffs to indefinitely extend the statute of limitations. At all events, the amendment was adopted, and it was evidently the intention to require parties to proceed with their litigation within a reasonable time—to place themselves, at least, in a condition to effect a service of process. And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal. In this case, there was no summons issued within the meaning of the act, and no attempt at service, till nearly four years after the filing of the complaint—no summons issued within the year, and none is authorized to be issued after the expiration of the year—and we think the action properly dismissed."

It is, therefore, clear that even though there was not the fatal and final objection to the service of summons here, that the defendant is not within the State of Idaho, and therefore canot be served, there is no ground for the issuance of another summons out of the State District Court because the summons that was issued within the year was held improperly served and another summons cannot be issued out of the State Court and the suit would be dismissed there.

Section 5-504 I. C. A. provides:

> "Another summons.—If the summons is returned, without being served on any or all of the defendants, or if it had been lost, the plaintiff may have another summons issued *within such time as the original might have been issued.*"

The part of the statute which we have italicized seems to us to further clench the point that even though the case were sent back, another summons cannot be issued.

The appellant was unable to reach the defendants with the process of the federal court in Idaho and he would be unequally able to reach them with the process of the state courts of Idaho—it will be borne in mind that the district court for the District of Idaho is coextensive with the boundaries of the state.

Appellant has suggested that in any event the dismissal should have been made without prejudice—the order appears on page 134 of the transcript and shows that it was not dismissed with prejudice.

MINOR POINTS.

Several minor points are raised which we think can be shortly answered.

Dismissal For Want Of Jurisdiction Does Not Carry Costs.

The answer is obvious for the statute authorizing dismissal, 28 U. S. C. A., Section 37, paragraph 80 plainly provides that the court can "* * * make such order as to costs as shall be just."

In one of the cases cited by appellant, Phoenix Butts Gold Mining Co. v. Winstead, 226 Fed. 863 (Appellant's Brief, 59), the court found that the granting of costs was a matter for its discretion.

The Defendant, Alexander Lewis, Did Not Join In The Petition For Removal.

Defendant Lewis was never lawfully served with summons at any time—he was a resident of New York and at the time the petition for removal was filed, February 27, 1937 (Tr. 13) there was no return of service on file. The record showed only an attempted service on one defendant, the appellee. One defendant under those circumstances can remove.

Kelly v. Alabama-Quenelda Graphite Co., 34 Fed. (2d) 790.

Hunt v. Pearce, 284 Fed. 321.

Bowles v. H. J. Heinz Co., 188 Fed. 937.

DEFAULT SHOULD NOT HAVE BEEN SET ASIDE FOR THE MOTION TO SET ASIDE SERVICE OF SUMMONS WAS NOT ACCOMPANIED BY THE CERTIFICATE OF AN ATTORNEY THAT HE BELIEVED IT WELL FOUNDED IN LAW.

We suggest this contention answered by quotation from Rule 13 of U. S. District Court for Idaho:

> "Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."

The motion to quash the service of summons and complaint was signed by Hawley & Worthwine and was verified individually by Jess Hawley and filed in the state court and the rules of the federal court did not apply to it. The motion to quash filed in the federal court was signed by one of the attorneys as well as by the firm name (Tr. 95). This was also true of the supplementary motion (Tr. 117).

CONCLUSION.

We respectfully advance that the appellant is not entitled to a reversal of this case.

Respectfully submitted,
JESS HAWLEY,
OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE,
Attorneys for appellee,
Manufacturers Trust Company.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY, a Corporation, and ALEXANDER LEWIS,

Appellees.

REPLY BRIEF OF APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

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.....Clerk.

Filed.....

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Counsel for defendant in his brief, in order to avoid the rule of law anounced in 82 Fed. (2 ed.) 375 (supra), has taken the position that under the state statute no new summons could issue. Therefore, it would be of no value to the plaintiff to have the case remanded.

Our answer to this contention is:

First. Whether or not a new summons could be issued is a matter solely for the consideration of the State court and not for the Federal court.

Second. When the Federal court entered its order quashing the service of summons and complaint its juris-

diction over the case ended, and when it went further (if at the request of the defendant) and proceeded to pass upon the question of whether or not under the State law a new summons could issue out of the State court, this under the authorities in our original brief and under all other authorities constituted a general appearance of the defendant and the case should not have been dismissed but remanded. In defendant's motion to quash service of summons it did not ask the court to pass upon the question as to whether or not a new summons could issue out of the State court, but defendant has now raised that question in its brief filed in this court. This we contend constitutes a general appearance in the action and is a waiver of the motion to quash service of summons.

Third. There is no limitation of the time service of summons should be made and the State court may permit the original summons to be withdrawn for the purpose of making a new service thereof.

Shaw vs. Martin, 20 Idaho 175.

Fourth. If the defendant's construction of the statute be correct, then in all cases where the first summons was issued on the last day of the year then no subsequent summons could ever be issued in the case. This is not a reasonable construction of the statute. The original service of summons in this case in the State court was quashed by order of the Federal Court May 5, 1938 (Tr. p. 130). We contend that the plaintiff had one year after the original summons had been quashed within which time to have a new summons issued which would be up to May 5, 1939.

The statutory time for issuing a new summons surely did not run while the original summons and the service thereof were under attack by the defendant.

In Laubenheimer vs. Factor, 61 Fed. (2 ed.) p. 630, the court says: "It is too well settled for discussion that Federal Courts take judicial notice of the public laws of all the states and of course of the particular state wherein the court is sitting."

Straton vs. New, 283 U.S. 318, 328,
75 L. Ed. 1060.

U.P.R. Co. vs. Wyler, 158 U.S. 285, 296,
39 L. Ed. 983.

Gormley vs. Bunyan, 138 U.S. 623, 635,
34 L. Ed. 1086.

This applies as well to authoritative decisions of the highest state tribunal declaring the law of the state.

Lamas vs. Micon, 114 U.S. 218, 223,
29 L. Ed. 94."

The State court has not passed upon the question of the sufficiency of the service of the first summons and complaint and if this case should be remanded the State court may hold the original service in said court to be a good and sufficient service.

The refusal of a Federal court to remand is reviewable on appeal from the final judgment of the Federal District Court.

Missouri Pacific Railroad Company vs. Fitzgerald,
160 United States 556, 40 Law Edition 536.

Taking into consideration the importance of this case

and the amount involved the court should not have dismissed the action but remanded the same to the State court, thereby permitting the plaintiff to have an opportunity to establish his cause of action.

Respectfully submitted,

SERENES T. SCHREIBER,
ALFRED A. FRASER,
Attorneys for Appellant,
Boise, Idaho.

No. 8973

IN THE

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FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

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PETITION FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

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PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
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PETITION FOR REHEARING

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

COMES NOW The appellant, WILLIAM I. PHILLIPS by his attorneys, and respectfully petitions the Honorable Court for a rehearing of the above entitled cause and for withdrawing, vacating, and a setting aside of decision, and the opinion of the Court in said cause filed February 14, 1939, and for an Order to Stay Mandate pending the further hearing, presentation, and decision in said cause.

Your petitioner herein shows unto your Honors that the Court misconceived and overlooked certain facts in the record and in rendering its decision, and that it would be

inequitable to permit the opinion and decision to stand as entered in the cause on the following grounds, to-wit:

I

The court overlooked and omitted to pass upon the question of the appellee appearing in the state court and by motion to quash, the Summons and Complaint thereby submitted to the Jurisdiction of the court and entered a general appearance. (Motion to Quash Tr. 19-20-21) (Minutes of the Court Tr. 29-30).

II

That the filing of authority to sign bond did not validate the act of attorney who had no authority in the first instance at all, when he proffered said purported bond, and it was illegal for him to sign any bond, and, of course, the same could not be amended. (Tr. 26).

III

That the filing of a sufficient bond *within the time to answer or plead* is a condition precedent to removal, neither the signing by the attorney nor the agent of the Surety Company was properly or legally done. (Minutes of the Court Tr. 42). (Power of Attorney Tr. 43, 44, 45, 46).

IV

The court overlooked the fact that the state court evidently had passed upon its own jurisdiction when it transferred the case to the federal district court, and it was improper to raise the same matter in the federal court by relying on the former motion filed in the state court, as it

was the duty of the appellees after the removal, to plead, demur, or answer within 30 days after the removal.

V

And the court erred in holding that the federal district court should overrule the holding of the state court on the question of state jurisdiction, since service was sufficient in the state court in the first instance, and the federal court erred when it refused to remand if the service was not deemed sufficient in its court.

VI

The court overlooked and misconceived that the appellees had been and were doing business in the State of Idaho at the time of service, both at the time of service in the state court, and at the time of service in the federal court. Tr. 103 (Patents) Royalty Checks Tr. 111-113; Affidavits Tr. 34-35; Affidavits Tr. 37-38; Affidavit Tr. 77-78-79; Affidavit Tr. 105; "United States Marshal's Return" Tr. 85; and Affidavit of William I. Phillips Tr. 86-87-88.

VII

The court erred in holding, inferentially, that Alexander Lewis did business in behalf of Huron Holding Company (a foreign corporation) as there is no evidence in the record that it had complied with the laws of the State of Idaho, but to the contrary, (and there is a conflict in the record on this point.) Therefore, neither the Huron Holding Company nor Alexander Lewis, for it,

could have done any business legally within the state. Tr. (Complaint) 3 Tr. affidavit 120-123.

VIII

And misconceived in holding that if the case were reversed, it would be necessary to obtain service again in the state court. The service in the state court was sufficient under the state law to give jurisdiction, and no further service would be required if reversal and remand be granted.

IX

And it was error to hold "there was nothing to show that service might soon be had or that the situation would change". (This, however, was not within the perview of the court's prerogative,) and no evidence was introduced to that effect.

X

The court overlooked the fact that to remove the case from the state court to the federal court and then dismiss at appellant's cost, would be error and, "cause appellant to go on a fool's errand."

XI

And the court overlooked and failed to pass upon the question of the right of appellees to appear and argue against remanding, after the federal district court had decided in their favor, since they were no longer interested.

POINTS AND AUTHORITIES

The right of removal is purely statutory, and one seeking the benefits of the statute must comply with its essential provisions.

Section 29, J. C. Statutes S. 1011.
Anderson vs. Troller, 32 Fed. 2nd 389.
Lambert Run Coal Co. vs. Baltimore & O. R. Co. 258 U. S. 377.
Elbs vs. Yates Am. Mrch. Co., 23 Fed. 2nd 368.
Thomas vs. Delta L. & W. Co., 258 Fed. 738.
Hoyte vs. Ogden Cement Co., 185 Fed. 88.
Al G. Barnes, 39 Idaho 807.
Cleveland C. C. R. Y. vs. Rudy, 89 NE 952.
Pickwick Stages vs. Board of Trustees of C. of El Paso, D. R. 208 Pac. 961.
Ransburg vs. Hackney Manu. Co., 164 Pac. 793.
Mahr vs. U. P. Power Co., 140 Fed. 921, Affirmed by 9th CCA 170 Fed. 699.
Jenkins vs. York Cliff's Implement Co., 110 Fed. 807.
Taylor vs. Taylor 182 So. 2nd 240.
Hudson Nav. Co. vs. Murray 233 Fed. 466.
Crawford vs. Foster, 84 Fed. 939.
Hammond et al vs. District Court of N. Mex., 228 Pac. 758.
Fowler vs. Continental Cas. Co., 124 Pac. 479.
Dailey et al vs. Foster, 17 N. Mex., 377, 128 Pac. 71.
Re-employers Reinsurance Corp., 82 Fed. 2nd 373.

If the state court had properly acquired jurisdiction in a method authorized by (state law), and not repugnant to the Federal Constitution or laws or natural justice, the federal court on removal will recognize such jurisdiction, and the process by which it was obtained.

4 Blatch. 120 Fed. Case 11261.
Hume vs. Pittsburgh C. & St. Light R. Co., 31 Fed. C #6865.
State vs. Bradley, 26 Fed. 289.
Sullivan vs. Missouri, P. Lines, 1 Fed. Supp. 803.
Gassman vs. Jarvis 100 Fed. 146.
Peters vs. Equitable Life Asso. of U. S., 149 Fed. 290.
Wena Lumber Co., vs. Continental Lum. Co., 270 Fed. 795.

After removal from the state court to the federal court, and the filing of the record, it was the appellees duty to plead, demur, or answer within 30 days.

Eggers vs. Julian Patrol Co., 22 Fed. 2nd 714 (29 J. C. 28 U. S. CA 72).
Caine vs. Commercial Pub. Co., 232 U. S. 124.

Neither the Manufacturers Trust, appellee, nor Alexander Lewis, trustee, or agent for Manufacturers Trust Co., nor Huron Holding Company, nor Alexander Lewis as trustee for Huron Holding Company, was authorized to do business in the State of Idaho, and that Manufacturers Trust Company and Huron Holding Company were one and the same.

R. C. L. Volume 21, S. 94.
Flynn vs. Gillin et al 10 So. Eastern (2nd) 923.
Donaldson vs. Thousands Springs Co. 29 Idaho, 735-162 Pac. 334.
Ojust Mining Co. vs. Manufacturers Trust Co., 82 Fed. 2nd 74.

Service on a foreign non-complying corporation upon a designated state official is prima facia sufficient.

Knapp S. N. Coal vs. Nat. Mut. F. Co., 30 Fed. 607.

Ehrman vs. Tetonia Insurance Co., 1 Fed. 471.

Walsh vs. Atlantic Coast R. R. Co., 256 Fed. 47.

McCullough vs. United Grocers Corp., 247 Fed. 880.

Indus. Research Corp. vs. Gen. Mo. Corp. 29 Fed. (2nd) 623.

Postal Telegram Cable Co., vs. Thornton 154 So. Western 1100.

The United States District Court erred in rendering a judgment of dismissal, with costs against appellant.

Swan Land & Cattle Co., vs. Frank 148 U. S. 324, 37 L-ed 580.

Wright vs. Missouri Pac. R. R. Co. et al, 98 Fed. (2nd) 34 (1938 case).

General Savings & Loan Soc. vs. Dormitzer (CCA 9C) 116 Fed. 471.

Forest vs. So. R. R. Co. 20 Fed. Supp. 851.

Appellees had no right to contest the motion to remand in the last instance.

Re-employers Reinsurance Corp., 82 Fed. (2nd) 373, 299 U. S. 375.

Appearance by special motion to quash, both summons and the complaint, is a general appearance.

Seager vs. Maney, 13 Fed. Supp. 617.
Elliot & Heeley vs. Worth, 34 Idaho 797.
Withers vs. Starce, 22 Fed. Supp. 773.
Picker vs. U. S. Cigar Store Co. of America, 6 Fed. Supp. 316.

ARGUMENTS

Upon the hearing of this cause in this Honorable Court counsel for plaintiff among other errors assigned, argued and maintained that the defendant in its so called Motion to Quash filed in the state court thereby entered a general appearance in the action. This question was disposed of by this court in its opinion in the following language,

> "Appellee did not enter a general appearance in the state court by filing therein in the motion to quash service (Orchard Co. v. C. C. Taft Co., 34 Ida. 458, 467, 202 Pac. 1062; 1 Ida. Code Ann. #12-504; Kline v. Shoup, 35 Ida. 527, 531, 207, Pac. 584)."

This part of the argument is applicable particularly under assignments No. One and Eleven, which in effect go to the same point. And we respectfully call the court's attention to the fact that the above cases, in our opinion, are not in point in this case. The special appearances mentioned in the above Idaho cases are entirely different from the one now before the court. They did not contain any of the defects or allegations which are contained in the so called special appearance in this case. The Supreme Court of Idaho in a later case Pittenger vs. Al G. Barnes Circus, 39 Idaho 807 announced the rule in this state to be that any appearance for any purpose except to object to the jurisdiction of the court over the defendant is a general appearance and this last case the courts find on page 812.

> "The rule to be observed by a defendant relying upon a special appearance to attack the jurisdiction of the court is well stated in Lowe v. Stringham, 14

Wis. 225, where the court said: "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.' "

For convenience of the court we hereby set forth in full the motion to quash. Our objections to the same follow.

MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT.

Filed in the State Court
February 27, 1937

COMES NOW, the defendant, MANUFACTURERS TRUST COMPANY, a corporation, by its Attorneys, Hawley & Worthwine, and appearing specially and for the sole purpose of quashing the purported service and the jurisdiction of the court under said attempted service, and not generally, or for any other purpose whatsoever, and does respectfully show the court:

I

That Manufacturers Trust Company is a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is a resident and citizen of the State of New York; *that the said corporation is not now, or at any other time has it been doing business in the State of Idaho.*

II.

That service of summons and complaint in this case has never been made upon the said defendant, Manufacturers Trust Company, by personal service *or otherwise,* but that on or about the 8th day of February, 1937, the plaintiff caused a copy of the said summons and complaint in this case to be served upon

Steven Utter, Auditor and Recorder of Ada County, State of Idaho, at his office in the court house in Boise, Idaho. That the said Auditor and Recorder above named was not on the 8th day of February, 1937, or at any other time, and is not now the agent or business agent transacting business for said Manufacturers Trust Company, a corporation, in the State of Idaho, or elsewhere.

That said defendant Manufacturers Trust Company, was not on the said 8th day of February, 1937, or at any other time, and is not now doing business in the State of Idaho, and that the purported service of summons and complaint in this case upon the said Stephen Utter, as Auditor and Recorder of Ada County, State of Idaho, did not constitute service thereof upon the said defendant corporation; that it is not and has not been served with summons and complaint in this action as provided by law.

III.

That this Honorable Court, therefore, does not have jurisdiction of the defendant corporation, the Manufacturers Trust Company.

WHEREFORE, Hawley & Worthwine respectfully move that the purported summons and complaint on the defendant, Manufacturers Trust Company, a corporation, be quashed.

This motion is based upon the records and files in this action, including this motion.

Dated this 27th day of February, 1937.

Hawley & Worthwine,
HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Defendant
Manufacturers Trust Company,
a corporation,
appearing specially.

Duly verified

The caption to the above motion is as follows: "Motion to quash service of summons and complaint." This caption does not determine the character of the motion and is not to be considered in passing upon the same.

In Cleveland C. C. R. Y. vs. Rudy 89 N. E. p. 952 the courts say:

> "It is also the settled rule that the court will determine the character of the pleading whether it is an answer or counter claim not by what the pleader calls it but by the facts which it contains and the character of relief sought."

In Pickwick Stages vs. Board of Trustees of City of El Paso De Robles, 208 Pac. p. 961 the courts say:

> "The Court was in error in holding that the pleading filed by the defendant was a cross-complaint. It is true that it is so denominated in the introduction and by endorsement thereon but it is thoroughly established that the designation given by a party to his pleading does not determine its character."

In the motion to quash we find the following:

> "Comes now the defendant the Manufacturers Trust Company, a corporation, by its attorneys, Hawley and Worthwine, appearing specially for the sole purpose of quashing the purported service and jurisdiction of the court under said attempted service and not general or for any other purpose whatsoever."

From the reading of this paragraph it is difficult to say what service they desired to quash. It does not say to quash the service of the summons or the service of the complaint or the service of any other paper in the case,

but they ask *to quash the jurisdiction of the court.* Do they mean the jurisdiction over the person of the defendant or the subject matter of the action. That is also a matter of conjecture. In paragraphs two and three of said motion they admit that a certain service of the summons and complaint upon the defendant was made in a certain manner. They also state in the motion that at the time of the service they were not doing business or had not been doing business at the time of said service. There is no statement in said motion where they directly request the court to quash the service of the summons or complaint served upon it in this action.

The only relief sought in this motion is as follows:

> "WHEREFORE, Hawley and Worthwine respectfully move that the purported summons and complaint on the defendant and Manufacturers Trust Company, a corporation, be quashed."

If the court had granted to the defendant the relief which it asked for and had entered its order quashing the summons and the complaint to which defendants could not have objected there is no question but what this act would have called for the exercise of the general jurisdiction of the court and the appearance of the defendant would therefore be a general appearance.

It is of no consequence that the court did not grant this particular relief to the defendant, and it is not by an act of the court that jurisdiction is obtained over the person of the defendant but it is by the act of the defendant requesting some relief beyond and outside of the one ques-

tion of jurisdiction over the person by failure to make proper service upon said defendant. And, of course, the question of service over a defendant is waived if in any manner under the law it makes a general appearance.

If the court had granted the relief asked by the defendant and had entered an order quashing plaintiff's summons and complaint it would have the same effect exactly as if the court had sustained a demurrer to plaintiff's complaint. In order to quash the summons and complaint the court would have to take general jurisdiction of the case and examine the said summons and complaint and see whether or not any legal reason existed for quashing the same.

Under the great weight of authority, a defendant who appears in court to object to the jurisdiction over his person must confine himself to that issue and if he should take any part in subsequent proceedings it will be deemed a general appearance. On page 135 of the transcript we find the following:

> "Be it remembered that on the 13th day of June, 1938, came on to be heard, the plaintiff's motion heretofore filed on the 11th day of June, 1938, to remand the said cause to the District Court of the Third District of the State of Idaho, in and for Ada County, from which it was removed, and for the reasons specified in the motion the Court hearing argument of the plaintiff, *and also allowed defendant's attorney to present argument in opposition thereto, to which plaintiff objected.*"

From the above statement in the record it appears that the defendant's attorney in court presented an argument

against the remanding of this action to the state court. By so doing we claim that it constituted a general appearance in this action. This appearance and argument by the defendant was in no wise related to whether or not proper service of summons had been made upon the defendant. Whether or not the argument of the defendant's attorney on this question had any influence upon the court in his decision to dismiss the action instead of remanding the same, we have no means of knowing, but we do contend that said defendant's attorney entered a general appearance by taking part in the argument.

We believe the position to be sustained by the following cases:

In Rensberg vs. Hackney Mfg. Co., 164 Pac. 793 the Courts say:

> "If a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person he must specially appear for that purpose only. And must keep out of court for all other purposes except to make that objection."

Mahr vs. Union Pacific Power Co., 140 Fed. 921, Affirmed by Ninth Circuit CCA 170 Fed. 699.

Jenkins vs. Taylor Imp. Co., 110 Fed. 807.

In Taylor vs. Taylor 182 So. (2nd) on page 240 the courts say:

> "If, however, the defendant does take some step in the proceedings which admits in law to a submission to the court's jurisdiction, the fact that the defendant insists that he never so intended or that he does not

admit the jurisdiction of the court over his person or that he only appears specially and not generally, is not sufficient to preclude the court from considering and holding that the defendant has entered a general appearance in contemplation of law whatever he may choose to denominate his act." (citing cases)

Hudson Navi Co. vs. Murray, 233 Fed. 466.

Crawford vs. Foster 84 Fed. 939, 28 CCA 576.

The Courts, in an unbroken line of decisions, say generally that any action on the part of a defendant except to object to the jurisdiction over his person, which recognized the case, as in court, amounts to a general appearance.

Hammond et al vs. Dist. Court of N. Mex. 228 Pac. 758.

Fowler vs. Continental Casualty Co., 17 N. Mex. 188, 124 Pacific, 479.

Dailey et al vs. Foster 17 N. Mex. 377, 128 Pac. 71.

Then again, as so pointedly said in re-Employers Reinsurance Corporation 82 Fed. (2nd) 373,

"Furthermore, having prevailed in its motion to quash the service defendant was no longer before the court and was without standing to object to the remanding of the case."

We contend that the state court had properly acquired jurisdiction, and the correct proceeding in such case is clearly set out in the case of Wena Lumber Co., vs. Continental Lumber Co. wherein it is said, notice of intention to remove is the first step in the proceeding, and pleading,

in some form is the last step. The requirement to plead may not be mandatory or jurisdictional in the sense that it might be waived by the parties or extended by the court, *but it is an essential step necessary to be taken by the defendant* before the cause shall then proceed in the same manner as if it had originally commenced in the federal district court. The same was held in the case of Virginia Bridge & Iron Co. vs. U. S. Corporation, wherein it was said what must be done in order to remove a suit from the state to the federal court.

It proceeds as follows:

> "It shall then be the duty of the state court to accept said petition and bond, and proceed no further in said suit. Written notice of said petition and bond for removal shall be given the adverse parties prior to filing the same. The said copy being entered within thirty days as aforesaid in said district court of the U. S., the parties so removing the said cause *shall* within thirty days thereafter plead, answer or demur to the declaration or complaint in said cause, and the case shall then proceed in the same manner as if it had been originally commenced in said district court."

When the jurisdiction of the state court was challenged, it had a right to pass on same while cause pending in said court and evidently the court must have done so, since it would not, and could not have removed the case to the federal court, and it is not for the federal court to say it did not have that right, but if not satisfied with the case in the manner in which it was received it was its duty to remand. Hoyte vs. Ogden Portland Cement Co. 185 Fed. 889. Jurisdiction is conferred when defendant enters a

general appearance, such appearance being an appearance for some other purpose than for raising the objection of lack of jurisdiction over him. It must be assumed the court ruled on the motion, although silent on same so far as the record shows. Nevertheless, it must have passed upon the question, as it did upon the bond, although silent in that particular also, without approving same in so many words. It is very apparent that what the appellees sought in the case was to remove the case from the state court to the U. S. Federal Court and then dismiss same, but as said re-Employers Reinsurance Corporation, "*the federal court may not be used to perpetrate an injustice.*"

We do not believe there can be a scintilla of doubt but that defendants, appellees, were doing business—they owned the property and from the record, it appears the property was being operated also can not be disputed. Alexander Lewis, trustee, was dead and no conveyance by him was ever made (if it was necessary) and the Huron Holding Company, a foreign corporation, was never authorized to do business in Idaho and could not take title legally directly or indirectly, and being one and the same as the Manufacturers Trust Company, as held by this Honorable Court, can it then be truthfully said that appellee was not within the state and subject to the laws of the State of Idaho?

In the case of Industrial Research Corporation vs. General Moters Corporation, 29 Fed. (2nd) 623, the court while recognizing that mere fact that stock holders of two corporations are the same with one exercising controll

over the other through ownership of its stock or through identity of stock holders, does not make the agent of the other held—that fiction of corporation entity may be disregarded where one corporation is organized and controlled, and its affairs are so conducted that it is, in fact a mere instrumentality or adjunct of another corporation. Postal Telegram Cable Co. vs. Thornton 154 South Western 1100.

In conclusion, may we again revert to the question of the authority of the attorney to sign the bond for the purpose of removal? It is a law in most every state of the union and the rule in the courts of the State of Idaho that a practicing attorney shall not become surety in a suit in which he is engaged as an attorney at law, and that he can not act in the dual capacity of surety and attorney in the same action. In most of the jurisdictions, the legislature has emphatically declared and provided for the regulation of matters of this kind, and in the absence of such legislative regulation, it is governed by the rule of court.

Remembering, then, that the authority for the attorney in the case at bar to sign the bond or any bond for removal was not granted until several days after the time for appearance had expired, and that the paper proffered as a bond was not signed or executed by an agent having lawful authority, and no seal having been attached to the bond by the purported agent of the Surety Company and which authority of the Surety Company was not perfected until more than thirty days after the removal. It is then self-evident that at the time of removal from the state

court to the federal court, there was no bond upon which plaintiff could recover, so that clearly the case was improperly removed and it was the duty of the United States District Court to remand the case. And a judgment for costs in favor of the appellee was also error, since the United States Federal Court admitted it did not have jurisdiction, but arbitrarily dismissed the case. We think this was error. Picker vs. U. S. Cigar Store Co. of America.

It, therefore, would seem it becomes necessary to reverse the case and to remand the cause or else appellant is clearly forstalled in his obtaining action for relief, and as said in the case of Caine vs. Commercial Publishing Company in the opinion the purpose of the provisions which are amended to the prior law, it is contended "*Is to expedite trials and preclude a defendant from preventing a speedy trial in the state court by removal proceedings and then consume the time and expense and exercise of jurisdiction of the federal court by invoking by motion the courts jurisdiction to dismiss the cause and thus compel plaintiff to go upon a fool's errand.*"

Respectfully submitted,

.....

Serenes T. Schreiber

.....

Alfred A. Frasier

Attorneys for Appellant,
Residence: Boise, Idaho.

I hereby certify that, in my opinion as counsel herein, the grounds of the foregoing petition are well founded, and I believe the foregoing petition for a rehearing in said cause to be well founded in law and that the same is proper to be presented and filed.

.....

Counsel for Appellant.

Received copy and accepted service of foregoing petition for re-hearing this.....day of March, 1939.

.....

Attorneys for Appellee,
Residence, Boise, Idaho.

No.....

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. W. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN, and ETHEL W. JOHNSTON, for themselves and others similarly situated,

Appellants,

vs.

BOISE CITY, a municipal corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City,

Appellees.

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

STRAWN & CO. INC. STATIONERS-PRINTERS, BOISE

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. W. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN and ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a municipal corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

OLIVER O. HAGA
RICHARDS & HAGA
Boise, Idaho
Attorneys for Appellants

THORNTON D. WYMAN
Z. REED MILLAR
Boise, Idaho
Attorneys for Appellees.

INDEX

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN, and ETHEL W. JOHNSTON, for themselves and others similarly situated, *Plaintiffs,*

—vs—

BOISE, CITY, a municipal corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Defendants.*

IN EQUITY

No. 1956

COMPLAINT AS AMENDED

Come now the above named plaintiffs, and complain of said defendants, and for cause of complaint allege and show:

I.

That E. H. Smith, one of the plaintiffs herein, now is, and for many years heretofore has been, a citizen

and resident of the City of Denver, said state; that D. N. McBrier, one of the plaintiffs herein, now is and for many years last past has been a citizen and resident of the State of Pennsylvania, residing in the City of Erie, said state; that F. B. McBrier, one of the plaintiffs herein, now is and for many years last past has been a citizen and resident of the State of Pennsylvania, residing in the City of Erie, said state; that Alice M. Bethel, one of the plaintiffs herein, now is and for many years last past has been a citizen and resident of the State of Colorado, residing in the City of Denver, said state; that Charles A. Owen, one of the plaintiffs herein, now is, and for many years heretofore has been, a citizen of the State of Michigan, residing in the city of Detroit, said State; that Morris K. Rodman, one of the plaintiffs herein, now is, and for many years heretofore has been, a citizen of the State of Michigan, residing in the city of Detroit, said State; that Ethel W. Johnston, one of the plaintiffs herein, now is, and for many years heretofore has been, a citizen of the State of Colorado, residing in the City of Denver, said state;

II.

That the defendant Boise City now is, and during all the times hereinafter mentioned was, a municipal corporation, in Ada County, Idaho, organized and existing under the laws of the State of Idaho; and the defendant Thomas F. Rodgers now is, and for more than one year last past has been, the duly appointed,

qualified and acting City Treasurer of said Boise City;

III.

That the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00), and is wholly between citizens of different states;

IV.

That by ordinance passed by the City Council of Boise City, and approved by the Mayor of said City, about the month of April, 1920, there was created and established Sidewalk and Curb Improvement District No. 38, in said Boise City, and thereafter such proceedings were had by the City Council and Mayor, acting for and on behalf of said Boise City and in the discharge of their duties as officers of said City, that said Boise City caused to be issued certain improvement bonds of said Local Sidewalk and Curb Improvement District No. 38, in the principal sum of $56,539.10; that said bonds were duly signed by the Mayor of said City, attested by the City Clerk under the seal of said City, and countersigned by the City Treasurer of said City. The said bonds bore interest at the rate of 7% per annum, payable semi-annually, and the principal thereof was payable on or before the first day of January, 1932, and both principal and interest were payable at the office of the City Treasurer of said Boise City, or at the Chase National

Bank, in the City and State of New York, at the option of the holder. A full, true and correct copy of said bonds, except as to number and denomination, and without the interest coupon thereto annexed, is hereto attached, marked "Exhibit A", made a part hereof and hereby referred to for a more complete statement of the terms and provisions thereof;

V.

That the said plaintiffs, for a valuable consideration, and without notice or knowledge of any of the negligent acts hereinafter referred to, acquired bonds so issued by said Boise City in the amounts hereinafter set forth, long prior to the first day of January, 1932, and said plaintiffs are still the owners and holders thereof, to-wit:

That the said E. H. Smith is the owner of $2,000, par value, of said bonds, to-wit: Bonds 44, 45, 54 and 55, of the denomination of $500.00 each,

That the said D. N. McBrier is the owner of $7,000, par value, of said bonds, to-wit: Bonds 40 to 43, inclusive, and 56 to 65, inclusive, of the denomination of $500.00 each,

That the said F. B. McBrier is the owner of $5,000, par value, of said bonds, to-wit: Bonds 78 to 87, inclusive, of the denomination of $500.00 each,

That the said Alice M. Bethel is the owner of $1,000, par value of said bonds, to-wit: Bonds 66 and 67, of the denomination of $500.00 each,

That the said Charles A. Owen is the owner of $10,000 par value, of said bonds, to-wit: Bonds numbered 94 to 113, inclusive, each of the denomination of $500.00,

That the said Morris K. Rodman is the owner of $2,000, par value, of said bonds, to-wit: Bonds numbered 49, 51, 52, and 53, each of the denomination of $500.00,

That the said Ethel W. Johnston is the owner of $500.00 par value, of said bonds, to-wit: Bond No. 50, of the denomination of $500.00,

And the said plaintiffs bring this action on behalf of themselves and all other holders of bonds of said issue, similarly situated, who may desire to share in the benefits that may be had from this action and contribute to the expense thereof;

VI.

That plaintiffs are informed and believe, and so allege the fact to be, that bonds of said issue, of the par value or principal amount of $37,000, maturing on or before January 1, 1932, are still outstanding and unpaid;

VII.

That plaintiffs have duly presented their said bonds to the City Treasurer of the City of Boise on several occasions after the first day of January, 1932, but said City Treasurer has declined and still declines to make any payment thereon and states as reasons for his re-

fusal that he has only about $2,817.57 in the fund available for the payment of said bonds and interest thereon from and after the first day of January, 1932;

VIII.

That plaintiffs are informed and believe, and so allege the fact to be, that over $21,000 of the funds belonging to said Local Sidewalk and Curb Improvement District 38, collected for the purpose of paying the bonds held by plaintiffs and other bondholders, have been wrongfully diverted, dissipated and lost by said Boise City through its negligence and carelessness, and through the wrongful acts, negligence and carelessness of its officers; That said city has been especially negligent and unfaithful in the discharge of its duties as statutory trustee for plaintiffs and other holders of bonds of said issue, and particularly in the following respects, but not limited thereto; that it permitted its former city clerk, who held the position of clerk of said Boise City for upwards of ten years immediately prior to the first day of September, 1933, to divert and appropriate to her own use, large sums of money of said city, including moneys collected for the payment of principal and interest on plaintiffs' said bonds; that the amount so diverted and misappropriated exceeds the sum of $92,000.00;

That the misappropriations and diversions by said city clerk to her personal use and benefit extended over a period of approximately ten years; that plaintiffs are informed and believe, and so allege the fact to be,

that during the fiscal year ending April 30, 1927, the amount aggregated about $2,600.00; and during the following fiscal years, ending on April 30th thereof, the amounts were approximately as follows:

1928	about	$3,360.00
1929	"	5,000.00
1930	"	10,500.00
1931	"	13,250.00
1932	"	20,775.00
1933	"	18,600.00

and from May 1st to September 30, 1933, nearly $12,000.00; that the total misappropriations and diversions were, as heretofore alleged, over $92,000.00; that plaintiffs are informed and believe, and so allege the fact to be that the said misappropriations and diversions included large sums from year to year, beginning with the year ending April 30, 1924, out of the funds belonging to said Local Sidewalk and Curb Improvement District No. 38, and the aggregate of the sums so misappropriated out of the funds belonging to said district and held by said Boise City as trustee for plaintiffs and other holders of bonds of said district is over $21,000.00, which money, if not so misappropriated and wrongfully diverted by said city clerk, would have been available for the payment of principal and interest on plaintiffs' said bonds;

IX.

That the defendant, Boise City, failed and neglected to faithfully discharge its duty as statutory trustee for

these plaintiffs and other holders of bonds of said District No. 38, or to properly conserve, care for and handle the trust funds coming into its possession and collected from and paid by property owners in said Improvement District No. 38, for the benefit of the plaintiffs and other holders of said bonds, but, on the contrary, said defendant carelessly and negligently permitted said funds to be misappropriated and diverted to other uses and purposes as hereinbefore alleged; that the said defendant, Boise City, failed to exercise the care and prudence required of it as such statutory trustee, and was careless and negligent, as aforesaid, and particularly in the following respects among others:

(a) Said Boise City carelessly and negligently, and without using ordinary care and prudence in such matters, appointed and kept in office an unfaithful, untrustworthy and dishonest city clerk who misappropriated and diverted the funds of said city in an amount exceeding $92,000.00, and the trust funds belonging to plaintiffs and other holders of bonds of said District No. 38 to an amount exceeding $21,000.00; that if the Mayor and Council of said Boise City had used the care and prudence required of them in the performance of their duties as such officers, they would not have employed said city clerk and they would have discovered long prior to the year 1933 the wrongful misappropriations and diversions of funds by said city clerk;

(b) That said misappropriations and diversions of

funds were made from year to year in such a manner that any officer of said city, using ordinary care and prudence and particularly the care and prudence required of him in the discharge of his duties, should and could have ascertained and known, long prior to the time that said city clerk was removed from office or requested to resign, that such funds were being diverted and misappropriated and, by the exercise of such care and prudence, substantially all of the funds of said District No. 38 so misappropriated and diverted could have been saved to plaintiffs and other bondholders;

(c) That said Boise City had and used a system of accounting that was wholly inadequate for the proper protection of the funds so held in trust for plaintiffs and other bondholders;

(d) That said city permitted its books and records to be kept in an inadequate and inefficient manner by negligent and incompetent employees who were untrustworthy and wholly incompetent to be entrusted with the care of said trust funds;

(e) That the employees of said city kept inaccurate and false records of the funds belonging to said District No. 38, all of which could have been ascertained by the officers of said Boise City if they had used ordinary care and prudence, and especially the care and caution required of them in their official positions and in the discharge of their official duties;

(f) That because of the careless, negligent and

inefficient manner in which the books and records of Boise City were kept, since the issuance and sale of the said bonds, many of the assessments levied for the payment of plaintiffs' bonds and collections made thereunder from the landowners in said District No. 38, for the payment of principal and interest on said bonds, were credited or placed in other funds; that said Boise City wrongfully waived penalties and interest imposed by law on delinquent payments of assessments levied on the property in said District No. 38 for the payment of said bonds and interest thereon, and in many instances the assessments so levied were thereafter wrongfully cancelled or rebated to the property owners; that said Boise City and the officers thereof charged with the duty of levying assessments for the payment of said bonds and interest thereon, failed and neglected to make the assessments required to be made therefor; that said Boise City failed to collect from Ada County sums belonging to said trust fund under assessments levied for the payment of said bonds and which sums were collected by Ada County and should have been paid to said Boise City and placed in said trust fund, and such payments would have been made by Ada County if the defendant, Boise City, and the officers thereof had used due care and prudence in caring for and conserving said trust fund and collecting or demanding the payments so made to said Ada County for the use of said fund; that because of the carelessness and the negligence and wrongful acts of said defendant, Boise Ctiy, in the perform-

ance of its duties as statutory trustee, assessments levied for the payment of said bonds and interest thereon were not certified to Ada County, as required by law, and large amounts payable under said assessments could not therefore be collected and the lien of the assessments preserved and maintained in effect and the collection of delinquent taxes enforced in the manner provided by law; that because of the wrongful, careless and negligent acts of said defendant, Boise City, and its officers charged with the duty of accumulating, conserving and maintaining said trust fund, large sums aggregating, as plaintiffs are informed and believe and so allege the fact to be, several thousand dollars have been lost to said trust fund but the exact amount thereof cannot be ascertained or known until a full, true and correct account is made by said statutory trustee of its actions and doings as such trustee;

That said Boise City has wrongfully paid to the holders of bonds numbered 1 to 39, inclusive, the full or face amount of said bonds, which was greatly in excess of their prorata or equitable share of the moneys collected by said city for the payment of all bonds issued and outstanding, and such payments were made when Boise City and its officers knew or should have known that the assessments levied would not create a fund sufficient for the payment of said bonds and interest thereon in full.

(g) That the defendant, Boise City, without the knowledge or consent of plaintiffs, compromised and

settled the claim against the sureties on the bonds of the city clerk, who had misappropriated over $92,000.-00, as aforesaid, of the funds of said Boise City, including over $21,000.00 of the funds belonging to said District No. 38, which surety bonds aggregated upwards of $30,000.00, but said defendant, Boise City, accepted in full satisfaction and discharge of its claim against said sureties the sum of $14,500.00; that said defendant, Boise City, has not transferred any part of the moneys so collected from said sureties into said trust fund; that said settlement and compromise was made on or about the month of March, 1936 and said sum of $14,500.00 was paid by said sureties to the Treasurer of said Boise City on or about said date;

X.

That the condition of said trust fund so required to be collected, conserved, maintained and held available for the payment of plaintiffs' bonds and interest thereon, cannot be ascertained or determined without the making of a full, true and correct account of the acts of said defendant, Boise City, showing the assessments made by said city for the payment of said bonds, the amounts collected with interest and penalties thereon, the amount of the assessments, penalties and interest cancelled, rebated and otherwise lost to said bondholders through the wrongful, negligent and careless acts of said Boise City and the officers thereof; that said assessments covered a period of upwards of about 10 years and several hundred separate lots, pieces and

tracts; that plaintiffs are remediless in the premises unless the defendant, Boise City, furnishes a true and correct account of its acts and doings as such trustee; that under the circumstances all of said payment of $14,500.00 made to said Boise City by the sureties on the bonds of the city clerk should be placed in said trust fund and the defendant, Boise City, should be required to make good any other loss sustained by said trust fund through the wrongful, careless and improper acts of said defendant, including loss sustained in settling with said sureties on the clerk's bonds for less than the amount for which the sureties were liable;

XI.

That there is due and owing from said Boise City to the plaintiffs herein the following sums with interest thereon at the rate of seven percent per annum from the 1st day of January, 1932, to-wit:

To said E. H. Smith, $2,000.00;
To said D. N. McBrier, $7,000.00;
To said F. B. McBrier, $5,000.00;
To said Alice M. Bethel, $1,000.00;
To said Charles A. Owen $10,000.00;
To said Morris K. Rodman $2,000.00;
To said Ethel W. Johnston, $500.00.

WHEREFORE, plaintiffs pray:

(a) That the defendant, Boise City, be required to make a full and true account of its acts as stautory trustee for the boldholders of said Local Sidewalk and

Curb Improvement District No. 38, showing the assessments levied for said fund, the collections made, the amount paid out for principal and interest out of said fund, the amount of the assessments, penalties and interest cancelled or rebated, the amount certified if any from time to time to the officers of Ada County for collection, the amount received from said Ada County on account of the assessment so certified and all other acts and things necessary to correctly show the performance of the duties of said Boise City, as statutory trustee;

(b) That it be adjudged and decreed that the amount collected, to-wit: $14,500.00 from the sureties on the bonds of the city clerk should be transferred to the trust fund of said District No. 38 and made available for the payment of principal and interest on plaintiffs' bonds and that said defendants be required to pay to plaintiffs, out of said trust fund, the amount due them, respectively, to-wit:

To the said E. H. Smith, $2,000.00, with interest at 7% from the 1st day of January, 1932;
To the said D. N. McBrier, $7,000.00, with interest at 7% from the 1st day of January, 1932;
To the said F. B. McBrier, $5,000.00, with interest at 7% from the 1st day of January, 1932;
To the said Alice M. Bethel, $1,000.00, with interest at 7% from the 1st day of January, 1932;
To the said Charles A. Owen, $10,000.00, with interest at 7% from the first day of January, 1932;

To the said Morris K. Rodman, $2,000.00, with interest at 7% from the first day of January, 1932;
To the said Ethel W. Johnston, $500.00, with interest at 7% from the 1st day of January, 1932.

(c) That if the said trust fund be insufficient to pay the amount due plaintiffs, as aforesaid, that plaintiffs may have judgment against said Boise City for any deficiency and for their costs herein;

(d) That plaintiffs may have such other relief as may be just and equitable.

RICHARDS & HAGA
and
OLIVER O. HAGA
Solicitors for Plaintiffs
Residing at Boise, Idaho

(Duly Verified)

EXIBIT A.

NUMBER	DOLLARS
40	500

UNITED STATES OF AMERICA

— : —

State of Idaho County of Ada

CITY OF BOISE CITY

Improvement Bond of
Local Sidewalk and Curb Improvement District
No. 38

KNOW ALL MEN BY THESE PRESENTS,

That the City of Boise City, in the County of Ada, and State of Idaho, acknowledges itself to owe and for value received hereby promises to pay to the bearer hereof the principal sum of

FIVE HUNDRED DOLLARS

in lawful money of the United States of America, on or before the first day of January, A. D. 1932, together with interest on said sum from the date hereof until paid at the rate of seven per centum per annum, payable semi-annually on the first days of January and July, respectively, in each year, as evidenced by and upon the presentation and surrender of the interest coupons hereto attached as they severally become due, both principal hereof and interest hereon payable at the office of the city treasurer in Boise City, Idaho, or at the Chase National Bank, in the City and State of New York, U. S. A., at the option of the holder, out of the local improvement fund heretofore created for the payment of the costs and expenses of the improvement constructed in Local Sidewalk and Curb Improvement District No. 38 in said city, and not otherwise.

This Bond is issued by said city for the purpose of providing funds for the payment of the costs and expenses of constructing the improvements in said Local Side*W*alk and Curb Improvement District No. 38, pursuant to, by virtue of and in all respects in full and strict compliance with the constitution of the State of Idaho, Article 3 and Article 6 of Chapter 163 of

Title XXXII of the Idaho Compiled Statutes 1919, and all laws of said state supplementary thereto and amendatory thereof.

And it is hereby certified, recited and warranted that said city is now and for many years past has been a city of said state and a body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the state of Idaho, and is now and always has been under the control of a duly organized mayor and council as the duly constituted corporate authority thereof; that all things, acts and conditions required by the constitution and laws of the State of Idaho and the ordinances of said city to exist and to happen and be done and performed precedent to and in the creation of the said Local Sidewalk and Curb Improvement District No. 38 and the construction of the improvements therein and the issuance of this Bond in order to constitute this Bond a valid and binding obligation of said city, payable as aforesaid, do exist and have happened and been done and performed in regular and due form and time; that the costs and expenses of said improvements which this Bond has been issued to pay have been duly levied and assessed as special taxes upon all of the lots, pieces and parcels of land in said Local Sidewalk and Curb Improvement District No. 38, separately and in addition to all other taxes, and said special assessments are a lien upon said lots, pieces and parcels of land; that due provision has been made for the collection of said special assessments, together with interest on un-

paid installments thereof at the rate of seven per centum per annum sufficient to pay the interest hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity.

In conformity with Section 4026 Idaho Compiled Statutes 1919, it is hereby recited that "The holder of any bond issued under the authority of this article shall have no claim therefor against the municipality by which the same is issued, in any event, except for the collection of the special assessment made for the improvement for which said bond was issued, but his remedy in case of nonpayment, shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued."

IN TESTIMONY WHEREOF, the City of Boise City, Ada County, Idaho, by its City Council has caused this Bond to be signed by the Mayor of said City, attested by the City Clerk thereof and countersigned by the City Treasurer and sealed with the corporate seal of said City as of the first day of January, A. D. 1922.

Eugene B. Sherman
Mayor

COUNTERSIGNED:
Florence G. Bush
City Treasurer

ATTEST:
Angela Hopper
City Clerk

(SEAL OF BOISE CITY)

(Title of Court and Cause.)

ANSWER

Filed March 27, 1937.

COMES now the defendants, Boise City, a municipal corporation, and Thomas F. Rodgers, as City Treasurer of said Boise City, and answers the bill of complaint of plaintiffs on file herein as the same is amended and for answer thereto admit, deny and allege as follows:

I.

Said defendants admit all the allegations of Paragraphs I, II, III, IV, VI and VII of said bill of complaint.

II.

That these answering defendants have no knowledge of the facts alleged in Paragraph V of the bill of complaint and therefore deny the allegations therein contained.

III.

Answering Paragraph VIII of said bill of complaint, defendants deny that over $21,000.00 or any other sum belonging to Local Sidewalk and Curb Improvement District 38, collected for the purpose of paying the bonds held by plaintiffs or other bondholders, has been diverted or dissipated or lost by Boise City through its negligence or carelessness, or through

any wrongful acts, negligence, carelessness, or otherwise, of its officers; deny that said city has been negligent or unfaithful in the discharge of any duty or duties as statutory trustee or otherwise for plaintiffs or other holders of bonds of said issue; admits that a former city clerk, Angela Hopper by name, who held the position of clerk of said Boise City for upwards of ten years immediately prior to the first day of September, 1933, diverted and appropriated to her own use large sums of money and admits that the said Angela Hopper diverted and appropriated to her own use moneys received by her for the payment of principal and interest on plaintiffs bonds and admits that the total amount of all sums diverted and appropriated by the said Angela Hopper exceeds the sum of $92,-000.00.

In that connection defendants allege: that C. S. Section 4013 now Section 49-2715 I. C. A. provides:

> "All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes.",

and that subsection 14 of Section 48 of the Charter of Boise City contains exactly the same provisions,

That on or about 1920 and prior to the organization of Local Sidewalk and Curb Improvement Dis-

trict No. 38, the City of Boise was operating its city government under and pursuant to the provisions of what is known as the Black Law, the general statutes of Idaho for municipalities, and that said section 4013 Compiled Statutes now Section 49-2715 I.C.A. was in force and applicable at said time and at all times subsequent thereto. That in the spring of 1927, said City elected to and did again operate its city government under and pursuant to the provisions of the City Charter of Boise City, Idaho, which Charter as amended by the Legislature of Idaho in 1927 contained subsection 14 of Section 48 as above alleged, and still so operates.

Defendants admit that the misappropriations and diversions by the said Angela Hopper to her personal use and benefit extended over a period of approximately ten years; admit that during the fiscal year ending April 30, 1927, the amount there of aggregated about $2,600.00, and that during the following fiscal years, ending on April 30th thereof, the amounts were approximately as follows:

1928 about $3,360.00
1929 about $5,000.00
1930 about $10,500.00
1931 about $13,250.00
1932 about $20,775.00
1933 about $18,600.00

and from May 1st to September 30, 1933, nearly $12,-000.00, and admits that the total misappropriations

and diversions were over $92,000.00 but in this connection defendants allege that of the sums misappropriated and diverted by the said Angela Hopper, only the following amounts thereof were funds received, collected and held by her as City Clerk of the defendant Boise City.

1927	$405.50	
1928	$1209.83	
1929	$1508.97	
1930	$1669.64	
1931	$3956.90	
1932	$5830.45	
1933	$5399.52	
May 1, 1933, to September 30, 1933		$7696.19
	Total	$27677.00

and alleges that the misappropriations and diversions by the said Angela Hopper collected by her as city clerk of Boise City and received and held by her in her official position did not exceed the sum of $27,677.-00; admits that said misappropriations and diversions included sums from year to year, beginning with the year ending April 30, 1924, out of funds belonging to said Local Sidewalk and Curb District No. 38, but deny that the aggregate of the sums misappropriated out of funds belonging to said district was over $21,-000.00 or any other sum in excess of the sum of $2,-242.92, or in any other manner than by Angela Hop-

per individually and deny that said money or any part or portion thereof was misappropriated or wrongfully diverted by said city clerk as an officer of Boise City or in any other capacity than individually; defendants do not have sufficient information or knowledge as to whether any of said moneys would have been available for the payment of principal and interest on plaintiffs bonds had the same not been misappropriated or diverted and therefore deny said allegation and the whole thereof.

IV.

Answering Paragraph IX of said bill of complaint, and particularly subparagraph (g) thereof, defendants admit that the defendant Boise City compromised and settled a claim against the sureties on the bonds of the city clerk, which surety bonds aggregated upwards of the sum of $30,000.00, and that Boise City accepted in full satisfaction and discharge of its claim against said sureties the sum of $14,500.00; admits that defendant, Boise City, has not transferred any part of the moneys so collected from said sureties into any trust fund; and admits that said settlement and compromise was made on or about the month of March, 1936, and that said sum of $14,500.00 was paid by said sureties to the Treasurer of Boise City on or about said date. Defendants deny that said city clerk of Boise City had misappropriated $92,000.00 of the funds of said Boise City or any other amount in excess of $27,677.00 and deny that said sum included over $21,000.00

or any sum or amount whatsoever of funds belonging to District No. 38.

Defendants deny each of the remaining allegations contained in said Paragraph IX and the whole thereof, save and except those portions of subparagraph (g) hereinabove specifically admitted.

V.

Answering Paragraph X of said bill of complaint, defendants deny that the condition of the fund of Improvement District No. 38 cannot be ascertained, or determined without the making of a full, true or correct account of any of the acts of the defendant, Boise City; deny that any such accounting need show any assessments made by said city for the payment of said bond or the amounts collected therefrom with interest or penalties thereon; deny that any assessments, penalties or interest have been canceled, rebated or otherwise lost to bondholders through any wrongful, negligent, careless or other act of Boise City or it's officers; admits that said assessments covered a period of upwards of about ten years and several hundred separate lots, pieces and tracts; deny that plaintiffs are remediless in the premises unless the defendant Boise City furnishes a true and correct account of its acts or doings and denies that any such acts or doings were in the capacity of trustee to these plaintiffs; deny that under the circumstances or otherwise that all or any part of the payment of $14,500.00 made to said Boise City by the sureties on the bonds of the city clerk

should be placed in the fund of District No. 38 and deny that the defendant, Boise City, should be required to make good any loss sustained by said fund of District No. 38 and deny that any loss occurred to said fund through or by any wrongful, careless or improper acts of said defendant, and deny that any loss was sustained by Boise City settling with the said sureties on the city clerk's bonds and deny that said settlement was for less than the amount for which the sureties were liable on said bonds.

In this connection defendants allege that subsequent to September 30, 1933, the defendant Boise City made and caused to be made a full, true and correct account of all of the books, records and accounts of all improvement districts in said Boise City, including Local Sidewalk and Curb improvement District No. 38 from the time of its creation to September 27, 1933, which audit and account fully and completely discloses all of the information desired by the accounting sought by plaintiffs in Paragraph X of said bill of complaint; that said audit and account cost the defendant Boise City in excess of $30,000.00 and was prepared and certified by competent and experienced public accountants as being true and correct; that said account and audit is now and at all time since completion thereof and long prior to the commencement of this action has been open and available for use by plaintiffs or their agents, servants or attorneys, and that all of the books, records and accounts in connection with Local Sidewalk and

Curb Improvement District No. 38 in possession and custody of the defendants are now open and available for inspection by plaintiffs, their agents, servants or attorneys; that under the circumstances aforesaid it would be inequitable and unconsciencable to require the defendant Boise City to make a second, further and additional account, audit or report to these plaintiffs.

VI.

Answering Paragraph XI of said bill of complaint, defendants deny each and every allegation therein contained.

WHEREFORE said defendant having fully answered said plaintiffs' bill of complaint as amended pray that said bill of complaint be dismissed, that the plaintiffs take nothing, and that said defendants may have the costs expended herein.

THORNTON D. WYMAN
MAURICE H. GREENE
Z. REED MILLAR
Attorneys for defendants

(Service Accepted)

(Title of Court and Cause)

MOTION.

Filed Sept. 10, 1937

COME NOW The plaintiffs and move the court for an order requiring the defendant Boise City, within a reasonable time to be fixed by the court, to make a full and true account of its acts as statutory trustee for the bondholders of Local Sidewalk & Curb Improvement District No. 38, showing among other things:

(a) The assessments levied for said fund,

(b) The collections made,

(c) The amount paid out for principal and interest, respectively, out of said fund to the holders of bonds secured by such assessments,

(d) The amount of the assessments, penalties and interest cancelled or rebated,

(e) The amount certified, if any, from time to time to the officers of Ada County for collection,

(f) The amount received from said Ada County on account of the assessments so certified,

(g) The amount of the assessments, principal, interest and penalties collected by the City Clerk of Boise and embezzled, or otherwise wrongfully appropriated,

(h) The allocation or distribution of the $14,500.00 collected by said Boise City from the sureties on the

bonds of the City Clerk and the amount thereof which it proposes to allocate to the fund set aside for the payment of the bonds held by plaintiffs and interest thereon.

Richards & Haga
Solicitors for Plaintiffs
Residence: Boise, Idaho

(Title of Court and Cause.)

ORDER

Filed Oct. 2, 1937

Plaintiffs' motion for an order requiring the defendant above named, Boise City, a municipal corporation, to make a full and true account of its acts as statutory trustee for the bondholders of Local Sidewalk and Curb Improvement District No. 38, showing, among other things;

(a) The assessments levied for said fund,

(b) The collections made,

(c) The amount paid out for principal and interest, respectively, out of said fund to the holders of bonds secured by such assessments,

(d) The amount of the assessments, penalties and interest cancelled or rebated,

(e) The amount certified, if any, from time to time to the officers of Ada County for collection,

(f) The amount received from said Ada County on account of the assessments so certified,

(g) The amount of the assessments, principal, interest and penalties collected by the City Clerk of Boise and embezzled, or otherwise wrongfully appropriated,

(h) The allocation or distribution of the $14,500.00 collected by said Boise City from the sureties on the bonds of the City Clerk and the amount thereof which it proposes to allocate to the fund set aside for the payment of the bonds held by plaintiffs and interest thereon,

and the court having heard argument of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED, That said motion be and hereby is granted, and said defendant Boise City, a municipal corporation, be and hereby is ordered to make and render a full and true account of its acts as statutory trustee for the bondholders of Local Sidewalk and Curb Improvement District No. 38 showing, among other things, the matters said forth in said motion above mentioned and that said Boise City serve such full and true account upon the plaintiffs herein, and file such account herein on or before November 15, 1937.

Dated this 1st day of October, 1937.

CHARLES C. CAVANAH
District Judge

(Title of Court and Cause)

MOTION

Filed Dec. 4, 1937

COME NOW The above named plaintiffs and move the court as follows:

(a) For an order requiring the defendants to furnish a further, fuller, better and more complete account by showing a statement or list, with a description sufficient for identification, of all lots and tracts, the owners of which have not paid the full amount of the benefit assessed against the same, with interest and penalties, and the amount of such benefits, interest and penalties that are still due and unpaid on each of such lots and tracts.

(b) For an order requiring the defendants to state definitely the amount they admit has been embezzled by the former City Clerk, Angela Hopper, instead of simply reporting what the audit report of Lybrand, Ross Bros. & Montgomery shows.

(c) For an order requiring the defendants to state definitely whether the items of $800.11 and $353.16 referred to in paragraph (g) of defendants' "Report and Account" verified on November 3, 1937, are admitted by defendants as having been collected and received by Boise City, and what defendants' position is or will be with reference to said items having been paid by the lot owners and what disposition has been made

of said sums by that city.

(d) For an order requiring the defendants to make such further accounting as may be necessary to determine the correct status of the trust account.

This motion will be based upon the records and files in the cause, including the report filed on or about November 23, 1937 by said defendants.

RICHARDS & HAGA
Attorneys for Plaintiffs
Residing at Boise, Idaho

(Title of Court and Cause)

OBJECTION TO REPORT AND REQUEST FOR FURTHER PARTICULARS

Filed March 9, 1938

TO THE ABOVE NAMED DEFENDANTS AND TO MESSRS. THORNTON D. WYMAN AND Z. REED MILLAR, Their attorneys of record:

YOU WILL PLEASE TAKE NOTICE That plaintiffs object to the supplemental report filed herein by the defendants for the reason that the same is incomplete in a number of particulars, and does not contain the information required to be contained in such report under the order of the court relative thereto.

Plaintiffs particularly demand a supplemental report showing:

1. The amount of interest paid annually on the bonds issued by Boise City for Local Sidewalk and Curb Improvement District No. 38.

2. The amount paid on the principal of such bonds during each and every year.

3. The amount of the tax or assessments levied for the payment of principal and interest during each and every year.

4. The amount collected annually by the city under such tax or assessments.

5. The amount of the tax and penalty certified to the county for collection annually.

In the first report filed, totals for the entire period are given. It is necessary that these totals be broken down so that we may allocate to each year the proportionate part of the total belonging to such year.

In paragraph (e) of the first report, the year should be stated when each certification was made.

There should also be shown the tax sales or conveyances to Ada County prior to the year 1928, and subsequent to the year 1931.

Dated this 5th day of March, 1938.

OLIVER O. HAGA
RICHARDS & HAGA
Attorneys for Plaintiffs

(Service Accepted)

(Title of Court and Cause.)

PLAINTIFFS' OBJECTIONS TO REPORTS AND ACCOUNTS FILED BY DEFENDANTS, AND REQUEST FOR FURTHER PARTICULARS.

Filed March 9, 1938

TO THE ABOVE NAMED DEFENDANTS AND TO MESSRS. THORNTON D. WYMAN and Z. REED MILLAR, Their attorneys of record:

YOU WILL PLEASE TAKE NOTICE THAT PLAINTIFFS object to the second supplemental report filed herein in behalf of defendants, for the reason that the same is incomplete in a number of particulars, and does not contain the information required to be contained in such report under the order of the court relative thereto, and plaintiffs particularly demand that said report and the other reports filed by defendants be supplemented by the report of Lybrand, Ross Bros. & Montgomery, certified public accountants, who, at the expense of the defendant, Boise City, audited the books and records of the city for the 10 year period commencing October 1, 1923 and ending September 30, 1933.

Dated this 8th day of March, 1938.

RICHARDS & HAGA
Attorneys for Plaintiffs

(Title of Court and Cause)

OPINION

Filed April 9, 1938

Messrs. Richards and Haga, Boise, Idaho
Attorneys for the Plaintiffs.
Thornton D. Wyman, Boise, Idaho
Z. Reed Millar, Boise, Idaho
Attorneys for the defendant.

APRIL 9, 1938

CAVANAH, District Judge.

The plaintiff brings the action for an accounting by the city, of its trusteeship for the bondholders of independent District 38, and for judgment in the amount found due.

On February 27, 1937 motions to strike and dismiss were presented to the Court and it was there held that under the Statute of the State Governing the issuance and collection of special assessments by the municipality to be applied in the payment of the bonds, that: "The bondholders have two remedies for the collection of their principal and interest, first; in case the city shall neglect to levy the assessment and pursue the usual and ordinary methods provided by the statute for the collection of the same, the holders of the bonds may compel it to do so by mandate, and if it fails and neglects to collect the assessments after levy having

been made and the property owners become delinquent in the payment of their installments, the bondholders may foreclose their lien through the Court, and second; the city may be sued and is liable for the amount of the assessment made for the improvement for which bonds were issued after it has by its officers collected the same, for the statute seems clear that the city is liable "for collection of the special assessments made." The facts alleged do not bring the case under the first remedy, for complaint is not made of failure of the City to act in levying the assessment and thereafter collecting the same, but it is brought under the second remedy to conserve and apply the assessment already collected by the City through its officers to the payment of the bonds as it alleges that the assessments were made and collected by the officer of the city and by her misappropriated." The liability of the city was held by the Supreme Court of the State, when in considering proceedings under the statute in local paving district 26, where the money collected by the city clerk, of the special assessment, had been *embezzled* by the City Clerk in the case of Cruzen v. Boise City 74 Pac (2) 1037, and in which the Court cited with approval the opinion of this Court in the present case. Smith v. Boise City Idaho, 18 Fed. Supp. 385. The inquiry then is, does the evidence sustain both the first and second remedies and the unlawful diversion of the special assessments after their receipt by the City, and if the plaintiffs are the owners of the bonds sued upon and in the amount, if any, is due them? It may be

further stated that should it appear that the city failed as statutory trustee for the bondholders, to perform its duty as such trustee in levying a sufficient amount to pay the principal and interest of the bonds or by its officers in misappropriating or unlawfully diverting, after receipt of the same, or that the money was collected from the special assessment and paid out contrary to the provisions of the statute, it becomes liable for such loss to the bondholders. It is relieved from legal liability if it observes the provisions of the Statute in that respect. That is the conclusion reached in the opinion in the present case, Smith v. Boise City et al, 18 Fed. Supp. 385. Bosworth v. Anderson 47 Idaho, 697, 280 Pac 227. Richardson v. City of Casper 45 Pac (2) 1. We must not become confused as to the extent of the City's liability from the authorities cited by the plaintiffs for the City's failure to pursue the usual and ordinary methods provided by the statute for the collection of the assessments, as they only apply after the City, through its officers, has collected the assessment and failed to account for or has unlawfully diverted the same, or neglected to comply with the statute in providing the necessary fund. It has to conserve and apply the amount already collected. Section 49-2728 I C A. Otherwise the city is not liable under the special statute which governs and defines its liability as such trustee, as the holders of the bonds must pursue the remedy provided by the statute by either mandamus to compel the City to act, or foreclose their special lien against the property assessed. Section 49-

2725. The New First National Bank of Columbus, Ohio, v. City of Weiser, 30 Idaho 15, 166 Pac. 213. No liability of the city under the circumstances is recited in the bonds. The trusteeship of the city being one limited by the statute and requires a performance of such statute, it is evident that the general rules regarding trustees do not apply for a statutory trust is not what is termed a "normal trust." 2 Bogart on Trusts Section 245.

We then turn to the evidence to ascertain, first; if the plaintiff is the owner and holder of the bonds in question and whether the City comes under the principle stated. The bonds involved are made payable to "bearer" and the plaintiff being the holder thereof and offers them in evidence without objection would seem to establish their ownership and right to maintain the action.

Under the order of the Court the City has filed three "reports and accounts", the first two of which are based principally upon information obtained from an audit of Lybrant, Ross Bros. and Montgomery, certified public accountants, which the plaintiffs assert are in many instances evasive, conflicting and inconsistent.

Referring to the order of the Court made on October 1, 1937, requiring the defendant to render and file a true account of its acts as statutory trustee for the boldholders, it is there provided that the following information be furnished to the plaintiff: "(a) The assessments levied for said fund, (b) The collections

made, (c) The amount paid out for principal and interest respectively, out of said fund to the holders of bonds secured by such assessments, (d) The amount of the assessments, penalties and interest cancelled or rebated, (e) The amount certified, if any, from time to time to the officers of Ada County for collection, (f) The amount received from said Ada County on account of the assessments so certified, (g) The amount of the assessments, principal, interest and penalties collected by the City Clerk of Boise and embezzled, or otherwise wrongfully appropriated, (h) The allocation or distribution of the $14,500.00 collected by said Boise City from the sureties on the bonds of the City Clerk and the amount thereof which it proposes to allocate to the fund set aside for the payment of the bonds held by plaintiffs and interest thereof."

Pursuant to the order the City made its report and account on November 24, 1937, showing:

(a)	Assessments levied	$56,493.62
	Interest levied	21,750.25
		78,243.87
(b)	Collections made;	
	City Clerk	31,060.27
	From Ada County	23,816.24
		54,876.51
(c)	Amount paid out for principal and interest;	
	As principal	19,539.10

As interest		31,932.88
		51,571.98

(d) That the records show no rebate or cancellations of assessments, penalties or interest.

(e) Amount certified to Ada County, This shows 10 installment certifications although the date isn't attached, it is later shown by the second supplemental account to have begun in 1922 and totals 49,470.93

(f) Amount received from Ada County from each such certification, totals 21,672.40
With subsequent items paid each year to 1937 making a grand total from Ada County of 23,816.24

(g) Refers to the only information available charged to the Angela Hopper embezzlement, the sum of 2,242.92
and two other items showed as
(1) unpaid and overdue and not certified to Ada County
and
(2) marked paid on rolls in excess of amount of duplicate receipts

(h) That the $14,500.00 were being held in a special suspension fund to be kept and maintained for judicial determina-

tion of the owners thereof.

A summary of the account presents the following:

TOTAL AMOUNT OF BONDS ISSUED

Bonds were issued January 1, 1922 which matured January 1, 1932, principal sum of $56,539.10

TOTAL ASSESSMENT AND LEVY FOR PRINCIPAL AND INTEREST MADE BY THE CITY

Amounts levied for principal	56,493.62
Levied for interest	21,750.25
Total	78,243.87

AMOUNTS COLLECTED AND ITEMS CHARGEABLE TO THE CITY

Collected by the City Clerk	31,060.27
Remitted to the City by Ada County	23,816.21
Total	54,876.48
Balance that should be in City Treasury being the difference between the amount paid in and amount paid out.	3,404.53
Amount appearing as unaccounted for by the City Clerk	2,242.92
Amount unpaid but not certified to the County by the City	800.11
Amount appear paid on tax rolls of the city but no receipts found	353.16
Amount appearing as the difference in the	

amount levied for amount levied for principal of bonds and the amount of bonds, as the amount levied was $56,493.62 and the total principal issue of the bonds was $56,539.10	45.48
	61,722.68

AMOUNTS ACCOUNTED FOR BY CITY

Amount paid by City Treasurer on Principal of bonds	19,539.10
Amount paid by City Treasurer on interest on bonds	31,932.88
Cash in City Treasury	3,404.53
	54,876.51

As appears from the above statement of the account it seems that the difference between the total chargeable items and those to be applied on the bonds is $6,846.17 which is to be pro-rated among the total unpaid bonds of the district. The remaining unpaid bonds in the District is $37,000.00 principal.

The other items which the plaintiffs urged should be chargeable against the City, and disallowed are:

(a) Penalty on the item of $800.11 and penalties not certified to the County of $2,698.87, it seems that they do not accrue until the property had become delinquent. The laws of the state require the City to certify to the County delinquent taxes and special assessments and when that is done the penalties attach

and are collected by the County and not by the City. Section 49-1711 and 49-2715 I C A. Thus the City is not liable for failure to certify penalties.

(b) As to the item relating to the claim of $10,-034.14, as interest which it is urged should be charged against the City for failure to levy for, it appears that the City paid out as interest on the bonds the sum of $31,932.88, and levied $21,750.25 for interest, the contention being made that the City did not provide by levy the difference between those amounts. It is sufficient to say that Section 49-2723 I C A provides that the funds arising from the assessments shall be applied towards the redemption of the bonds, and the City treasurer shall pay the interest on the bonds out of the local improvement funds. The Supreme Court of the State in the case of Bosworth v. Anderson 47 Idaho 697, 280 Pac 227, refused to hold a city liable for applying the fund on interest, see Moore v. Nampa (CCA9th) 18 Fed. (2) 860. That was done here, the $10,034.14 was paid as interest out of the fund. "The bondholders look primarily to the local improvement district fund for the payment; first, of all interest due, then of the matured bonds themselves in numerical order, as far as the money collected will go." New First National Bank of Columbus, Ohio v. Linderman 33 Idaho 704, 198 Pac 159.

(c) As to the item of $6,513.04 which it is urged should be chargeable against the city on account of it paying bonds 1 to 39 inclusive in the numerical order

instead of pro-rata. It seems that the bonds did not mature until January 1, 1932 and those paid were before maturity. The statute giving the manner of payment of the bonds in Section 49-2723 I C A, and it is there provided: "Whenever there shall be sufficient money in any local improvement fund against which bonds have been issued under the provisions of this chapter, over and above the amount sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more bonds, the Treasurer shall call in and pay such bonds, which shall be called and paid in their numerical order." The statute seems clear as making it the duty of the City treasurer, whenever there shall be sufficient money in the fund over and above the amount sufficient for the payment of interest on all unpaid bonds, to pay the principal of *one* or *more* bonds in their numerical order. There were no objections made when the bonds were paid by any bondholder or other person as to the payment in numerical order and the entire issue had not matured, in fact none of the bonds had matured but the City had the right as provided in the bonds to redeem them on or before maturity. The mere fact that during some of the time there were due on some of the property taxes did not exhaust the security, because under the state revenue laws the remaining security would not become exhausted for a number of years. In the case of Myers v. City of Idaho Falls 52 Idaho 81, 11 Pac (2) 626, the Court, when in referring to the case of New First National Bank of Columbus, Ohio, v.

Linderman, supra, said; "The bonds were not yet due and the remaining security had not been exhausted, these facts marking the difference between that case and the case we are considering." When the bonds were redeemed it stopped the accumulation of interest.

It remains to be considered that there is, to the bondholders, $25,630.33 caused by delinquencies of certain of the properties in the District which was certified to the County by the City for failure to pay the general taxes which should be held as a payment to all the unpaid bondholders if not lost under the laws of the State for payment of the taxes, subject to their foreclosure or other action, but not against the City.

The amount found owing to the unpaid bondholders from the City should be distributed among them in the proportion which each unpaid bondholder's interest bears to all the outstanding unpaid bonds.

Plaintiff should have judgment in accordance with the views here expressed.

(Title of Court and Cause)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed April 23, 1938

THIS CAUSE came on to be heard at this term, and was submitted upon the written argument of coun-

sel; and thereupon, upon consideration thereof, the court finds, concludes and decides as follows, viz.:

FINDINGS OF FACT

I

The following facts alleged in plaintiffs' complaint were admitted by the answer of defendants:

(a) That the plaintiffs E. H. Smith, Alice M. Bethel and Ethel W. Johnston, are citizens of the State of Colorado, residing in the city of Denver, said State; that D. N. McBrier and F. B. McBrier are citizens of the State of Pennsylvania, residing in the city of Erie, said State; that Charles A. Owen and Morris K. Rodman are citizens of the State of Michigan, residing in the city of Detroit, said State.

(b) That Boise City is a municipal corporation organized and existing under the laws of the State of Idaho, and that Thomas F. Rodgers is Treasurer of said City.

(c) That the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of $3,000.00;

(d) That about the month of April, 1920, Boise City created by ordinance, duly passed by the Council and approved by the Mayor, Local Sidewalk and Curb Improvement District No. 38 of said City, under what is now Chapter 27 of Title 49 (secs. 49-2701 to 49-2730), Idaho Code Annotated, 1932, and said Boise City caused to be issued and sold bonds under said

Chapter 27 in the principal sum of $56,539.10, bearing date the first day of January, 1922, payable to bearer, and bearing interest at the rate of 7% per annum, payable semi-annually on the first day of January and the first day of July of each year commencing July 1, 1922; that all of said bonds were made payable on or before the first day of January, 1932, at the office of the City Treasurer of said Boise City or at the Chase National Bank in the City of New York.

(e) That said issue of bonds there remains unpaid and outstanding bonds of the principal amount of $37,000, and interest thereon from January 1, 1932.

(f) That the holders of said bonds duly presented the same for payment to the City Treasurer of said Boise City after the first day of January, 1932, but he declined and refused to pay the same for the reason that he held in the fund available for the payment of such bonds only the sum of $2,817.57.

(g) That a former city clerk who had held the position of Clerk of said Boise City for upwards of ten years immediately prior to the first day of September, 1933, failed to account for a large sum of money belonging to Boise City, which includes $2,242.92 of the funds of said Local Sidewalk and Curb Improvement District No. 38, collected for the purpose of paying said bonds.

II.

That the defendant City failing to exercise ordinary

care and prudence in causing to be kept accurate records resulted in the City Clerk keeping inaccurate and false records of the funds belonging to said District No. 38, and the amount here found to be unaccounted for was wrongfully diverted and misappropriated by the City Clerk, and the negligent, careless and inefficient manner in which the books and records of the City were kept resulted in losses to said fund that should have been applied on the payment of said bonds as appears from the following tabulated statement:

Total amount of bonds issued	$56,539.10	
Total amount levied for payment of principal	56,493.62	
Deficit in amount levied for payment of principal		$ 45.48
Amount remitted by City Clerk to City Treasurer	$31,060.27	
Amount remitted by County Treasurer to City Treasurer	23,816.21	
TOTAL RECEIVED BY CITY TREASURER	$54,876.48	
Amount paid by City Treasurer on principal of bonds	$19,539.10	
Amount paid by City Treasurer on interest on bonds	31,932.88	
TOTAL PAID OUT BY CITY TREASURER	$51,471.98	

Difference between amount received by City Treasurer and amount paid out	3,404.50
Amount unaccounted for by City Clerk	2,242.92
Assessments shown on books of City Clerk as unpaid but not certified to county	800.11
Amount marked paid on assessment rolls but no receipts found and money not accounted for	353.16
TOTAL	$6,846.17

III

That the following table shows the amount levied by said Boise City for principal and interest during the years 1922 to 1931, inclusive, and the amount of assessments that became delinquent because of default of the lot owners in making payment, according to the books of the city clerk, and the amount of delinquent taxes certified to Ada County for collection under the statute during each of such years:

Year	Principal	Interest	Delinquent	Certified to County
1922	$5649.36	$3954.55	$5590.20	$6042.13
1923	5649.36	3559.10	4505.10	5366.10
1924	5649.36	3163.65	5036.79	5575.32
1925	5649.36	2768.20	4612.69	5021.75
1926	5649.36	2372.75	3859.36	4784.96
1927	5649.36	1977.30	4801.88	4522.81
1928	5649.36	1581.85	4694.54	4742.25

1929	5649.36	1186.40	4618.34	4646.85
1930	5649.36	790.95	5152.01	4856.11
1931	5649.38	395.50	4312.69	3912.65

IV

That bonds numbered 1 to 39, inclusive, of the principal amount of $19,539.10, were redeemed before maturity, and interest coupons to the amount of $31,-784.11 were paid, and also an additional sum of $148.-77 was paid for interest; that said bonds were redeemed on the dates and in the amounts following, to-wit:

Numbers of Bonds	Date of Redemption	Amount Redeemed
1 to 4, inclusive	July 25, 1923	$2,039.10
5 and 6	Jan. 2, 1924	1,000.00
7 to 9, inclusive	July 19, 1924	1,500.00
10 and 11	Jan. 2, 1925	1,000.00
12 to 18, inclusive	July 20, 1925	3,500.00
19 to 24, inclusive	July 19, 1926	3,000.00
25 to 28, inclusive	June 20, 1927	2,000.00
29 and 30	Sept. 12, 1927	1,000.00
31 to 33, inclusive	July 11, 1929	1,500.00
34 to 37, inclusive	Mar. 6, 1930	2,000.00
38 and 39	Jan. 28, 1931	1,000.00

That the failure of the city to redeem one-tenth of the bonds during each year, commencing with the year 1922, was due largely to the failure of many of the lot owners to pay their assessments as the same became due, or at all; that the principal amounts of ac-

cumulated delinquent assessments certified by the city to Ada County for collection, remaining unpaid, exclusive of interest, for the years 1922 to 1931, were as follows:

Year	Amount
1922	4,364.48
1923	7,586.17
1924	10,185.30
1925	12,799.83
1926	14,658.76
1927	17,384.32
1928	20,042.57
1929	22,708.18
1930	25,213.88
1931	27,798.53

V.

That the condition of the trust fund which Boise City was to create, collect and apply to the payment of the bonds held by plaintiffs and others similarly situated, could not be ascertained without full, true and correct accounting being rendered by the defendants; that Boise City made a settlement with the sureties on the general bond of the city clerk in office, from the time the said bonds were issued until about September 1, 1933, and received in settlement from the sureties on the general bonds of said city clerk the sum of $14,500.00, which amount is still held by the treasurer of Boise City and is not allocated to any fund in that office.

VI.

That plaintiffs are the holders and owners of the following bonds, issued for improvements in said local sidewalk and curb improvement district No. 38:

E. H. Smith	Bonds Nos. 44, 45, 54, 55—4 bonds	$2,000.00
D. N. McBrier	Bonds Nos. 40 to 43, and 56 to 65, inclusive—14 bonds	7,000.00
F. B. McBrier	Bonds Nos. 78 to 87, inclusive—10 bonds	5,000.00
Alice M. Bethel	Bonds Nos. 66 and 67 2 bonds	1,000.00
Charles A. Owen	Bonds Nos. 94 to 113 inclusive—20 bonds	10,000.00
Morris K. Rodman	Bonds Nos. 49, 51, 52 and 53—4 bonds	2,000.00
Ethel W. Johnston	Bond No. 50—1 bond	500.00
	Total	27,500.00

VII.

That the holders of the remaining $9,500.00 of outstanding bonds issued on account of said improvement district have not appeared in this cause; that plaintiffs have employed counsel to conduct this litigation on behalf of all of said bondholders and are entitled to be reimbursed therefor out of the fund recovered by their suit, and for such purpose $700.00 is fixed as

reasonable fees for counsel in making investigations of the fund, preparing the cause for trial and conducting the litigation to final decree.

VIII.

That additional monies may hereafter be paid by Ada County to the treasurer of said Boise City on account of the assessments levied by said Boise City for the payment of the bonds issued on account of said Local Sidewalk & Curb Improvement District No. 38.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court concludes and decides:

I.

That plaintiffs are entitled to a decree and judgment against the defendant, Boise City, for the sum of $6,846.17, together with costs of this action, with interest thereon at the rate of 6% per annum from the date of decree; that from the said sum of $6,846.17, there shall be deducted and paid to counsel for plaintiffs by said Boise City the said sum of $700.00.

II.

That the balance of said $6,846.17, to-wit: $6,146.17 shall be prorated over the outstanding bonds, to-wit: $37,000.00 and all bondholders shall be paid their respective prorata parts of said amount.

III.

That any additional monies hereafter collected or

received by said Boise City or the treasurer thereof for the fund created for the payment of bonds issued on account of said Local Sidewalk & Curb Improvement District No. 38, shall be prorated between the bondholders according to the amount of bonds held by each; that if any bonds be not presented within a reasonable time from the entry of the decree, plaintiffs may apply to this court for a further order in the premises.

Let decree be entered accordingly.

CHARLES C. CAVANAH,
District Judge

Dated April 23rd, 1938.

(Title of Court and Cause)

DECREE

Filed April 23, 1938

THIS CAUSE came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That plaintiffs, for themselves and all others similarly situated who are holders of bonds issued for improvements made in Local Sidewalk and Curb Improvement District No. 38 of said Boise City, have judgment against said defendant Boise City for the

sum of $6846.17, together with costs of this action, with interest on said amounts at the rate of six per cent. (6%) per annum from the date hereof.

2. That payment thereof shall be made in the manner following, to-wit:

(a) There shall be paid to Messrs. Richards & Haga, counsel for plaintiffs herein, the sum of $700.00, as fees for their services as plaintiffs' counsel in this cause, and said amount, with interest thereon until payment is made, shall be deducted from the said sum of $6846.17 and interest thereon;

(b) That the balance of said $6846.17, with interest thereon, after deducting the fees of counsel as aforesaid, shall be paid pro rata to the holders of the outstanding bonds, to-wit, $37,000, as their interest may appear; that for the purpose of said pro rata payment the plaintiffs who appeared in the cause are owners of said bonds in the amounts following, to-wit:

E. H. Smith	$2,000.00
D. N. McBrier	7,000.00
F. B. McBrier	5,000.00
Alice M. Bethel	1,000.00
Charles A. Owen	10,000.00
Morris K. Rodman	2,000.00
Ethel W. Johnston	500.00

That payment to other holders of bonds shall be made only as the bonds are surrendered at time of payment.

3. That any additional moneys hereafter received by Boise City, or the Treasurer of said City for the

account of the fund created for the payment of said bonds, shall be prorated and paid to said bondholders on the basis hereinbefore set forth.

4. That if any bonds be not presented within a reasonable time from the entry of this decree, plaintiffs may apply to this court for a further order and directions as to the payment of any moneys in the fund created for the payment of said bonds, and jurisdiction over the cause and the parties is hereby retained for such purpose.

5. That the defendant Boise City shall pay to Messrs. Richards & Haga, counsel for plaintiffs, but not out of the fund created for the payment of said bonds as aforesaid, the costs incurred by plaintiffs herein, taxed at $34.00.

DONE in open court this 23rd day of April, 1938.

CHARLES C. CAVANAH
District Judge

(Title of Court and Cause)

STATEMENT OF THE EVIDENCE ON APPEAL

Lodged August 5, 1938
Filed Aug. 30, 1938.

THIS CAUSE Came on for trial before the Honorable Charles C. Cavanah, District Judge, on the 9th

day of March, 1938, at ten o'clock A. M.,; Oliver O. Haga of the firm of Richards & Haga appeared for the plaintiffs, and Thornton D. Wyman and Z. Reed Millar appeared as attorneys for the defendants, whereupon the following proceedings were had:

Counsel for plaintiffs reviewed briefly the motions that had been filed for an accounting and the orders that had been made by the court requiring that an accounting be made by the defendants, and the substance of the reports that had been filed by the defendants pursuant to such orders.

Plaintiffs thereupon offered in evidence bonds held by the plaintiffs, respectively as follows:

Exhibit No. 1: Bonds held by plaintiff E. H. Smith, aggregating $2,000 par value,

Exhibit No. 2: Bonds held by plaintiff D. N. McBrier, aggregating $7,000 par value,

Exhibit No. 3: Bonds held by the plaintiff Frank B. McBrier, aggregating $5,000 par value,

Exhibit No. 4: Bonds held by the plaintiff Alice M. Bethel, aggregating $1,000 par value,

Exhibit No. 5: Bonds held by the plaintiff Charles A. Owen, aggregating $10,000 par value,

Exhibit No. 6: Bonds held by the plaintiff Morris K. Rodman, aggregating $2,000 par value,

Exhibit No. 7: Bond held by the plaintiff Ethel W. Johnston, aggregating $500 par value,

Making a total of $27,500 of bonds held by plaintiffs, with interest due from January 1,

1932, at the rate of 7% per annum, no part of which, either principal or interest, has been paid.

Whereupon, counsel for plaintiffs stated:

"I assume that the reports which the defendant has filed are before your Honor as a part of the record in the case. Naturally, we do not vouch for these reports.

* * * * * *

"The reports, as I have stated, set forth that they are based upon the audit made by Lybrand, Ross Brothers & Montgomery, and are taken from data contained in that audit. I submit that that audit should be made available for examination in court, so that we may check the data upon which these reports purport to be based."

Counsel for plaintiffs thereupon offered the audit report of Lybrand, Ross Brothers & Montgomery, and the same was admitted for the purpose of showing the connection and pertinency of certain exerpts from such report, which counsel stated he proposed to offer in evidence, and which he said were particularly pertinent to the issues in the case. The audit was received for that purpose.

Whereupon, counsel for plaintiffs offered the following excerpts from the said audit of Lybrand, Ross Brothers & Montgomery:

Excerpt from page 21 of audit:

"All special assessment records were examined in detail for the entire period of our audit, but in

accordance with arrangements agreed upon with you, we did not confirm all balances due. We did, however, request confirmation of about 30 pct. of the amount of assessments which our audit indicated were paid but for which the cash had not been accounted for. In addition, various other confirmations were requested in connection with our verification of other receipts and expenditures, to the extent found practicable under the circumstances of the relative importance of amounts involved or of the availability of addresses of the individuals, firms, and companies from whom confirmations were desired."

Excerpt from page 26 of audit:

"Due to the lack of records and the laxities in the administrative supervision of the handling of the city's funds, we were unable to completely ascertain the extent of all losses sustained by the city, and especially the extent to which unauthorized or fraudulent expenditures may have been made, or the extent to which various departmental and miscellaneous revenues may have been withheld from deposit with the city treasurer."

Excerpt from pages 30-31 of audit:

"*Condition of Records*: In previous divisions of this report we have discussed the general condition of the records and the volume of transactions relating to or affecting the time required for our audit.

"The extent to which records were missing, and the chaotic conditions resulting from the continued and ever-present inefficiencies, irregularities, falsifications, and indifferent workmanship that permeated the records throughout the entire period of our audit, are beyond all possibility of a comprehensive statement thereof in brief form, for the purpose of this resume, that would fairly and adequately acquaint you with such conditions.

"Therefore, we direct your attention to the detailed comments throughout this report, where we have necessarily referred to the conditions encountered by us in order to adequately explain the extent and results of our work. In addition, your attention is especially directed to the comments on 'Accounting Methods and Personnel,' wherein we present our detailed recommendations for the correction of these conditions.

"In general, our findings with respect to the unsatisfactory condition of the records are that (a) too little thought has been given to the matter of competence and technical bookkeeping and clerical ability on the part of employees engaged for bookkeeping and clerical duties, (b) the city clerk failed to exercise supervision of the accounting records and procedure such as was required of her as city auditor, and (c) the annual audits failed to bring the unsatisfactory conditions to the attention of the council so that steps for the correction thereof could be taken."

Excerpt from page 38 of audit:

> "*Special Assessment Funds*: While the ordinances establishing improvement district funds specified the amount of the assessments to be levied, errors of large amounts were made in recording such assessments in the fund accounts. For instance, the total assessments for sidewalk and curb improvement district No. 38 was entered for approximately $21,500 less than the actual amount of the assessments, and none of the weed assessments, except for 1930, were recorded. Such errors may have been made intentionally since they provided a means for reducing the amounts for which the city clerk would be accountable, thus permitting collections on the unrecorded amount of assessments to be applied to offset collections on other assessment funds that had been withheld by the city clerk."

Excerpt from pages 202-203 of audit:

> "In recording the improvement district rolls, interest was added to each assessment, as provided by law, although numerous errors were made in the computations. We noted that all of such interest has been recorded as surplus of the respective improvement district funds, notwithstanding the fact that a portion of such interest had not been collected or earned.
>
> "We noted many instances where assessments were paid in full in advance of the installment

dates and the unmatured interest thereon was cancelled. In recording such collections, no record of the cancellation of the interest was made. Thus, the accounts of the improvement district funds indicated amounts due which had been settled in full.

* * * * * *

"In many instances, we noted that penalties were not collected, even though due and chargeable, and instances were noted of delinquent payments on the same roll and on the same dates where penalties were collected in some cases and not collected in others, there being apparently no uniformity of fixed dates after which penalties were chargeable.

"Numerous errors were found in the city's records of penalties and interest added for delinquencies, and in many instances no records of such amounts were made on the city's books. In this report, we have provided for the adjustment of all penalty and interest accruals on delinquent assessments, although we necessarily had to rely in many instances upon the information furnished to us by the county, since the city had no records of such accruals."

Excerpt from page 204 of audit:

"In many instances taxpayers have redeemed their properties by paying the city and county taxes thereon and also the delinquent special as-

sessments. In such cases, the county's records indicated the redemption of such property and the city was advised by periodical reports from the county treasurer's office. When property is taken over by the county and later sold for taxes, it often happens that the amount realized is not sufficient to pay all delinquent taxes and assessments. In such cases, the special assessment funds suffer a loss but we noted that in many instances such losses had not been recorded on the city's books. For the purpose of this report, we have given effect to all such losses reported to us."

Excerpt from page 207 of audit:

" * * The individual assessments were in numerous instances recorded on the rolls, either originally or as later revised, in a careless manner and with a lack of uniformity of method, being either typewritten, in ink, or in pencil. The rolls contained numerous alterations and many items had been ruled out, making it difficult, and in some instances impossible, to determine therefrom the correct figures for the purposes of verifying the amount of assessments to be accrued.

"In connection with the assessment rolls of improvement districts, no record was made of the rate of interest to be added incidental to the bonding of the assessments. Therefore, we could determine the rates only by making tests of the computations of the bonded rolls, and in some in-

stances we found that slightly different rates of interest had been applied to individual assessments of a specific roll. Inaccuracies were found in the calculation of the yearly installments of the bonded rolls. Individual assessments were found to have been left open on the current rolls beyond the dates assumed for delinquency, and in some instances these apparently open and uncollected assessments had been transferred to delinquent rolls while in other instances they had not been so transferred."

Excerpt from pages 208-209 of audit:

" * * Approximately 34,000 receipts were issued for collections of special assessments during the period of our audit. The duplicates of these receipts were, in general, in a deplorable condition for the purposes of our examination, due to the numerous falsifications that had been made in the alteration of the amounts, names, and descriptions which comprised the details of the receipts. Not only were there numerous instances of such alterations, but upon many duplicate receipts the details had been so entirely erased for the apparent purposes of concealing irregularities in connection with collections, that such details could not be identified at all with any given assessment found upon the rolls. In many instances the details of a duplicate receipt were entirely erased and the receipt had been used as a duplicate purporting

to represent an entirely different collection.

"Errors and irregularities occurred in the entering of collections in the cash book of the city clerk's office for amounts differing from the amounts as shown by the duplicate receipts, and additionally, errors of distribution to funds in respect of collections entered in the cash book increased the difficulty of reconciliation between the status of special assessments as shown by the rolls with that as shown by the fund accounts.

"Upon certification of delinquent taxes to Ada County for collection, the amounts certified for specific rolls were found almost without exception to be at variance with the amount of open items remaining uncollected as shown by the current rolls of the respective districts. The reconciliations of these variations were rendered difficult by the lack of explanations in the records and by the evidence of falsifications in connection with the entries.

"As a part of our auditing procedure, it was found necessary to completely analyze all fund accounts as kept in the office of the city clerk for the entire period covered by our engagement. As a result thereof, we found many instances of collections of current assessments received by the city clerk which had been credited as collections upon delinquent assessments presumed to have been made by Ada County, and vice versa. Also, we

found that numerous collections of special assessments had not been recorded as such on the fund accounts but had been credited to revenues. Furthermore, interest and penalties collected by Ada County had been credited to delinquent assessments but no offsetting accrual therefor had been made, resulting in a lack of reconciliation of the amounts of assessments uncollected as shown by the rolls of delinquent assessments and/or the records of Ada County, with the amounts of such assessments uncollected as shown on the fund accounts.

"As a result in general of the condition of the records, and of the errors, inefficiencies, and falsifications which attended the keeping of the records, as commented upon in foregoing paragraphs, we regret that we can express only the severest criticism of these conditions."

Excerpt from page 210 of audit:

"Throughout this division of our report we comment further upon other limitations of the records due to their lack of availability or their condition, the inefficient manner in which they were kept, the errors and falsifications, inconsistencies of entries, absence of necessary explanations, unrecorded transactions and other phases of the city's accounting and in general, explain further the scope of our audit."

Excerpt from page 213 of audit:

"The amounts of rebates and allowances upon various special assessments, which had been entered upon the current rolls, as well as those which were reported to us by the treasurer of Ada County as having been credited upon the delinquent assessments, were given effect to by us in our adjustments of the fund accounts. These, however, were not susceptible of our verifications in detail, since, with the exception of a few instances, there were no records available to us of the city having issued authority for such rebates and cancellations."

Excerpt from page 223 (Vol. II) of audit:

"Tabulated statement entitled,

'SUMMARY OF SPECIAL ASSESSMENTS, Continued.'

'Accruals During Period'

(Oct. 1, 1923-Sept. 30, 1933)

shows the following information relative to Sidewalk and Curb Improvement District No. 38:

Balances Oct. 1, 1933	
Per Books	$ 46,651.52
Adjustments of Oct. 1, 1923 Balances, Net (Adjustments disclosed by our audit)	17,368.42
Penalties, Interest, Rebates, and Adjustments, Net	2,341.64
Total Amount to Account For	66,361.56

Collections Accounted for	43,010.14
Uncollected Assessments Sep. 30, 1933	19,658.57
Due on Tax Liens	385.33
To be Rebated or Cancelled on County Rolls	88.65
Amounts Unaccounted For	3,396.19

Excerpt from page 239 (Vol. II) of audit:

"DETAILS OF SPECIAL ASSESSMENTS TO BE REBATED, OR CANCELLED ON COUNTY ROLLS, Continued.'

Sidewalk and Curb Improvement District No. 38 shows 7 parties and tracts for which rebates were allowed, in the sum of $88.65."

Excerpt from page 245 (Vol. II) of audit:

"'SUMMARY OF SUSPENSE, AMOUNTS UNACCOUNTED FOR (CLASSIFIED BY FUNDS), Continued'

shows the following data relative to Local Sidewalk & Curb Improvement District No. 38:

Total	$3,396.19
Special Assessments	3,396.19"

Excerpt from page 246 (Vol. II) of audit:

"'SUMMARY OF SPECIAL ASSESSMENTS UNACCOUNTED FOR

'For the period from October 1, 1923 to September 30, 1933'

shows the following data relative to Local Sidewalk & Curb Improvement District No. 38:

Total Special Assessments Unaccounted for, Net	$3,396.19
Shown as Paid on Rolls; No duplicate Receipts found, and Cash Not Entered on Cash Book	2,242.92
Shown as Paid on Rolls in Excess of Amounts of Duplicate Receipts	353.16
Shown on Rolls as Unpaid and Overdue; Not certified as Delinquent to Ada County	800.11"

Excerpt from page 5 (Vol. III) of audit:

"'SUMMARY OF SPECIAL ASSESSMENTS UNACCOUNTED FOR

'For the period from October 1, 1923 to September 30, 1933'

Local Sidewalk and Curb Improvement District No. 38

Total Special Assessments Unaccounted for, Net	$3,396.19
Shown as Paid on Rolls; No duplicate Receipts Found, and cash not entered on Cash Book	2,242.92
Shown as Paid on Rolls in Excess of Amounts of Duplicate Receipts	353.16
Shown on Rolls as Unpaid and Overdue; Not certified as Delinquent to Ada County	800.11"

Whereupon counsel for defendants offered in evidence the reports which defendants submitted and filed pursuant to the orders of the court directing that an account be furnished. Said reports, insofar as pertinent to the issues involved on appeal, are as follows:

FIRST REPORT AND ACCOUNT

Filed November 23, 1937

(Title of court and cause omitted):

"Comes now the defendant Boise City and in response to the order of this Court made and entered on the.....day of October, 1937, makes and files this its report and account of Local Sidewalk and Curb Improvement District No. 38, as follows:

a. That the books and records of Boise City show:

Assessments levied (as shown by the assessment roll)	$56,493.62
As shown by the ledger account in the City Clerk's office	56,539.10
Interest levied (as shown by the Assessment roll)	21,750.25

No interest account appears in the ledger account.

b. As shown by the ledger account of Boise City:

Assessments, principal and interest, paid to Angela Hopper and

by her remitted to the City Treasurer are $31,060.27

Assessments certified to and collected by the County Treasurer of Ada County, including principal, interest, penalties and delinquency interest and amounts received by Ada County from tax sales and remitted to the City Treasurer 23,816.24

c. That the books and records of Boise City show the following:

Amount paid out as principal of bonds $19,539.10

Amount paid out as interest on bonds 31,932.88

d. That subsequent to the issuance of the bonds and based upon the assessment roll outstanding and unpaid at the time the bonds were issued, the records of Boise City do not show any cancellations or rebates of assessments or penalties or interest thereon within the knowledge of defendant.

e. That the amounts certified to the officers of Ada County for collection are as follows:

1st installment certification	$6042.13
2nd " "	5366.10

3rd	"	"	5575.32
4th	"	"	5021.75
5th	"	"	4784.96
6th	"	"	4522.81
7th	"	"	4742.25
8th	"	"	4646.85
9th	"	"	4856.11
10th	"	"	3912.65

f. Received from Ada County:

1st certification		1677.65
2nd	"	2144.41
3rd	"	2976.19
4th	"	2407.22
5th	"	2926.03
6th	"	1797.25
7th	"	2084.00
8th	"	1981.24
9th	"	2350.41
10th	"	1328.00

Received subsequent:

1932	953.67
1933	247.68
1934	376.59
1935	340.35
1936	180.66
1937	44.89
Total	$23816.24

g. That according to the audit report of

Lybrand, Ross Brothers, and Montgomery, the sum of $2,242.92 is shown as 'paid on rolls, no duplicate receipts found and cash not entered in cash book' and this amount is charged to the Angela Hopper embezzlement.

That according to the audit report of Lybrand, Ross Brothers, and Montgomery, the amount of $800.11 is shown as 'Unpaid and overdue, not certified as delinquent to Ada County' and the amount of 353.16 is shown as 'Paid on Rolls in excess of amounts of duplicate receipts.' That the auditors were unable to determine whether the last two amounts were embezzled by Angela Hopper.

h. That the $14,500.00 received by Boise City from the sureties on the official bonds of the said Angela Hopper was at the time of its receipt placed in a special suspense fund in the office of the City Treasurer of Boise City and the whole of said sum has at all times been kept and maintained in said special suspense fund; and that the whole of said amount will be kept and maintained in said fund until a judicial determination has been had of the ownership of said funds and the allocation thereof to the various funds maintained in the office of the City Treasurer of Boise City.

"That the defendant Boise City has made no determination or proposal of any kind or taken any steps toward proposing to allocate any of said funds to the fund set aside for the payment of the bonds and interest thereon held by plaintiffs and does not know and cannot state to the court whether the plaintiffs are legally entitled to have allocated any portion of such funds to the payment of said bonds and interest thereon.

"Thornton D. Wyman
Z. Reed Millar
Maurice H. Greene
Attorneys for Defendants

"STATE OF IDAHO)
County of Ada) ss.

"M. A. REGAN and THOMAS F. RODGERS, being duly sworn, each for himself, depose and say:

"That they are the City Clerk and City Treasurer of Boise City respectively, and as such officers have in their possession and custody the books and records of Local Improvement District No. 38 of said Boise City; that the foregoing is a true and correct report and account of the matters and things therein set forth or shown by the books and records in the custody of affiants to the best of their

knowledge and belief.

"M. A. Regan
Thomas F. Rodgers"

(Subscribed and sworn to and service acknowledged November 23, 1937.)

SUPPLEMENTAL REPORT AND ACCOUNT

Filed January 14, 1938

(Title of court and cause omitted):

"COMES NOW the defendant, Boise City, and offers this it's supplemental report and account for Local Sidewalk and Curb Improvement District No. 38, and respectfully shows to the court additional matter requested by plaintiffs as shown by the records of Boise City, the audit report of Lybrand, Ross Brothers and Montgomery, and the records of Ada County, as far as the said Boise City has been able to go in obtaining said records.

"Respectfully submitted,
THORNTON D. WYMAN
Z. REED MILLAR
Attorneys for Defendants"

* * *

"On the following four pages is information obtained from the audit of Lybrand, Ross Brothers and Montgomery, Auditors, as to certain as-

sessments and property involved under Special Improvement District No. 38. In that accounting the terms and designations therein used mean and are defined as follows:

ROLL PAGE means the page of the original assessment roll upon which the entry appears.

LOT, BLOCK and ADDITION refer to the legal description of the property.

PERIOD ENDED refers to the end of the period in which that assessment fell due.

AMOUNT UNACCOUNTED FOR means the sum of the assessment which is not shown as paid.

"So far as the records of Boise City are concerned the schedule herein presented contains the information with respect to all of the property involved in this improvement district, on which the assessments either have not been paid or have been paid and embezzled by Angela Hopper as the schedule may indicate, respectively."

"DETAILS OF ASSESSMENTS SHOWN ON ROLLS AS UNPAID AND OVERDUE NOT CERTIFIED AS DELINQUENT TO ADA COUNTY

Roll Page	*Lot*	*Block*	*Addition*	*Period Ended*	*Amount Unaccounted For*
91	1-3	38	Ellis	4-30-26	$28.33"

(Here follow a number of items similar to the above, making a total of $800.11.)

* * * *

"DETAILS OF ASSESSMENTS SHOWN AS PAID ON ROLLS; NO DUPLICATE RECEIPTS FOUND, AND CASH NOT ENTERED ON CASH BOOK.

Roll Page	*Lot*	*Block*	*Addition*	*Period Ended*	*Amount Unaccounted For*
56	W½	8	Dundee	4-30-25	$40.55"

(Here follow a number of items similar to the above, making a total of $2,242.92.)

* * * *

"DETAILS OF ASSESSMENTS SHOWN AS PAID ON ROLLS IN EXCESS OF AMOUNTS OF DUPLICATE RECEIPTS IN ORIGINAL LOCAL SIDEWALK AND CURB IMPROVEMENT DISTRICT NO. 38

Receipt No.	*Date*	*Lot*	*Block*	*Addition*	*Period Ended*	*Amounts Unaccounted For*
181	7-6-27	13-16	30	South Boise	4-30-28	$52.70"

(Here follow a number of items similar to the

above, making a total of $353.16.)

* * * *

"The accounting which follows contains all of the information in the hands of Boise City of property included in Original Local Sidewalk and Curb Improvement District No. 38 upon which the special assessment.. since the year 1928 have not been paid, and shows the disposition of the property affected and the assessment for the particular year. The following statement identifies the particular piece of property by tax number instead of legal description and in this matter the term 'Deeded' and the date immediately following the word 'Deeded' refer to the date Ada County received title to said property on account of delinquent taxes. The date indicated under the column marked 'Sold' means the date on which Ada County sold the property involved to a purchaser. The absence of a date indicates that the property has not been sold. The term 'Ada County' in the first column after the tax number indicates that Ada County is the owner of the property and the term 'Not deeded' indicates that either a tax deed has not been issued to Ada County on the property or that the County has received title to the property through some other source. The column on the extreme right of the page indicates the amount of the assessment against each particular piece of property for that year. Because of lack of adequate records in Ada

County pertaining to the special assessments certified, it is, in many instances, impossible to follow the exact disposition of the property involved or determine its exact status. Some of this property is sold on contract out of which the purchase price is obtained and from which it is possible in the apportionment of the purchase price thereof that a sum will be apportioned to this improvement district but we have no records to determine that.

"On the last page of this schedule is a recapitulation as of October 31, 1936, showing the amount of deeded property to Ada County, the property in the name of Ada County and the property which remains delinquent on said date on the records of Ada County."

"1928 Tax No. Sold Sidewalk #38

#2325 Deeded 1-31-29 3-18-35 $17.28"

(Here follow a number of items, similar to the above, except as to number and description of property and date of deed and amount.)

"TOTALS 1928

Deeded Property	$727.55
Property in name of Ada County	1926.21
GRAND TOTAL	$2653.76"

* * * * *

"1929 Tax No. Sold Sidewalk #38

2291 Ada County 3-18-35 $33.99

(Here follow a number of items, similar to the

above, except as to number and description of property and date of deed and amount.)

"TOTALS

Deeded Property	$452.91
Property in name of Ada County	1990.91
Delinquent property	33.88
GRAND TOTAL	$2477.70"

* * * * *

"1930 Tax No. Sold Sidewalk #38
2291 Ada County 3-18-35 $32.07

(Here follow a number of items, similar to the above, except as to number and description of property and date of deed and amount.)

"TOTALS

Deeded property	$455.59
Property in name of Ada County	1934.47
Delinquent Property	53.82
GRAND TOTAL	$2443.88"

* * * * *

"1931 Tax No. Sold Sidewalk /38
2222 Ada County 3-18-35 $30.09

(Here follow a number of items, similar to the above, except as to number and description of property and date of deed and amount.)

"TOTALS

Ada Co. and Deeded Property	$2049.88

Delinquent Property	107.46
GRAND TOTAL	$2157.34"

* * * * *

"As of October 31, 1936.

1928	Deeded, Ada County	$2653.76
1929	" " "	2443.82
1930	" " "	2390.06
1931	" " "	2049.88
	TOTAL	$9537.52
1929	Delinquent	33.88
1930	"	53.82
1931	"	107.46
	TOTAL	$195.16
	GRAND TOTAL	$9732.68"

SECOND SUPPLEMENTAL REPORT AND ACCOUNT FILED MARCH 8, 1938 (TITLE OF COURT AND CAUSE OMITTED):

"Pursuant to plaintiffs' objection to report and request for further particulars, we herewith submit the following to supplement the first report and account:

"Subdivision 'e', covering the amount certified to the officers of Ada County for collection, contains the installment certifications beginning in 1922 and each subsequent certification being made in each subsequent year thereafter to 1931, in-

clusive.

"The receipts shown in subdivision 'f' begin with the year 1923 and consecutively for 10 years until 1932, inclusive.

"The last above amounts are the exact portions of each installment certified which were paid. The amount.. certified as having been received subsequent do not belong to any particular installment certification but have been paid from general delinquencies or from tax sales.

"Attached hereto, marked Exhibit 'A', is a statement of the details of each installment of the bonds showing in respective columns the amount of 'Principal', 'Interest', 'Taxes Paid to Clerk', 'Delinquent', 'Penalty', 'Certified to County', 'Collected and Paid by County', 'Accumulated Delinquent and Uncollected,' and also includes the details of the payments made on principal of bonds and on interest thereon.

"A recapitulation of the totals disclosed in Exhibit 'A' attached hereto discloses the amount of assessment levied, the amount of interest levied, the amount paid to the City Clerk, the amount received from Ada County, the Amount paid out as principal on bonds, the amount paid out as interest on bonds and the amount remaining delinquent on the records of Ada County. The total amount received by Boise City is shown as compared to the amount paid out by Boise City on

principal and interest, and this difference is the only amount which Boise City could be liable for under any theory of liability of embezzlement or otherwise, and no admission of any other liability because of the embezzlement of Angela Hopper or otherwise is intended to be made in these reports and accounts or the answer except as this final accumulation and recapitulation on file shows. It is as follows:

Assessments levied per assessment roll	$56,493.62
Interest levied per assessment roll	21,750.25
Total	$78,243.87
Amounts received by City Clerk	$31,060.27
Received from Ada County	23,816.24
Total	$54,876.51
Amount paid out by Boise City on principal of bonds	$19,539.10
On coupon and straight interest	31,932.88
Total	$51,471.98
Difference between amount paid in and amount paid out	$ 3,404.53
Cash on hand, February 28, 1937	3,087.80
Amount short, difference between amount paid in and amount paid out and funds on hand	315.73

Total delinquencies, difference between amount certified to Ada County and the amounts remitted to Boise City by Ada County, including payment of $24.36 in February, 1938	$25,630.33
Total bonds unpaid at this date	$37,000.00

"It is admitted by Boise City that misappropriations of Angela Hopper from the funds of the said district, as disclosed by the facts above submitted, *is* $215.73.

"From the records of Boise City it is impossible to determine the tax sales and conveyances to and from Ada County prior to the year 1928 or subsequent to the year 1931. That such information is not contained upon the records of Boise City, but is a part of the records of Ada County, the details of which are never certified nor required by law to be certified to Boise City, and that, with the matters furnished herein, Boise City has furnished all of the facts pertaining to said Local Sidewalk and Curb Improvement District No. 38, that it is possible for it to furnish.

"Dated March 7, 1938.

"Respectfully submitted,

Thornton D. Wyman
Z. Reed Millar
Attorneys for Defendant"

Exhibit "A" to Second Supplemental Report and Account

LOCAL SIDEWALK AND CURB IMPROVEMENT DISTRICT NO. 38 BOISE CITY

Showing assessments levied for payment of bonds and interest, Collections and Delinquencies.

~~4,784.96~~ ~~2,407.22~~ ~~12,799.83~~

		Principal	Interest	TOTAL	Tax Paid to Clerk	Delinquent	Penalty	Certified to County	Collected and paid by County	Accumulated Delinquent and Uncollected
1922	1st Instalment	$ 5,649.36	$ 3,954.55	$ 9,603.91	$ 4,013.71	$ 5,590.20	$ 549.28	$ 6,042.13	$ 1,677.65	$ 4,364.48
1923	2nd Instalment	5,649.36	3,559.10	9,208.46	4,703.36	4,505.10	487.90	5,366.10	2,144.41	7.586.17
1924	3rd Instalment	5,649.36	3,163.65	8,813.01	3,776.22	5,036.79	406.80	5,575.32	2,976.19	10.185.30
1925	4th Instalment	5,649.36	2,768.20	8,417.56	3,804.87	4,612.69	456.52	5,021.75	2,407.22	12,799.83
1926	5th Instalment	5,649.36	2,372.75	8,022.11	4,162.75	3,859.36		4,784.96	2,926.03	14,658.76
1927	6th Instalment	5,649.36	1,977.30	7,626.66	2,824.78	4,801.88		4,522.81	1,797.25	17,384.32
1928	7th Instalment	5,649.36	1,581.85	7,231.21	2,536.67	4,694.54		4,742.25	2,084.00	20.042.57
1929	8th Instalment	5,649.36	1,186.40	6,835.76	2,217.42	4,618.34		4,646.85	1,981.24	22,708.18
1930	9th Instalment	5,649.36	790.95	6,440.31	1,288.30	5,152.01		4,856.11	2,350.41	25,213.88
1931	10th Instalment	5,649.38	395.50	6,044.88	1,732.19	4,312.69		3,912.65	1,328.00	
	(Total)	$56,493.62	$21,750.25	$78,243.87	$31,060.27	$47,183.60	$ 2,001.50	$49,470.93	$21,672.40	$27,798.53

PAYMENTS MADE ON PRINCIPAL OF BONDS AND FOR INTEREST THEREON

Nos. of Bonds and Date of Redemption		Amount Paid on Principal	Amount Paid on Interest Coupon	
1, 2, 3 & 4	July 25, 1923	$ 2,039.10	$ 3,957.74	(July 1922, Jan. 1923)
5 & 6	Jan. 2, 1924	1,000.00		
7, 8 & 9	July 19, 1924	1,500.00	3,886.37	(July 1923, Jan. 1924)
10 & 11	Jan. 2, 1925	1,000.00		
12 to 18 incl.	July 20, 1925	3,500.00	3,692.50	(July 1924, Jan. 1925)
19 to 24 incl.	July 19, 1926	3,000.00	3,447.50	(July 1925, Jan. 1926)
25, 26, 27 & 28	June 20, 1927	2,000.00		
29 & 30	Sept. 12, 1927	1,000.00	3,202.50	(July 1926, Jan. 1927)
31, 32 & 33	July 11, 1929	1,500.00	2,940.00	(July 1927, Jan. 1928)
34, 35, 36 & 37	Mar. 6, 1930	2,000.00	2,887.50	(July 1928, Jan. 1929)
			2,555.00	(July 1929, Jan. 1930)
38 & 39	Jan. 28, 1931	1,000.00	2,625.00	(July 1930, Jan. 1931)
			2,590.00	(July 1931, Jan. 1932)
	(Total)	$19,539.10	$31,784.11	
	Interest without coupon		148.77	
	Total		$31,932.88	

	Collected Subsequent
1932	$,953.67
1933	247.68
1934	376.68
1935	340.35
1936	180.66
1937	44.89
Total	$23,816.24

$25,654.69

Plaintiffs pray that the above statement of evidence be settled, approved and allowed by the court as a true, full, correct and complete statement of all the evidence taken and given on the trial of said cause, for use on the appeal taken by plaintiffs to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 5th day of August, 1938.

RICHARDS & HAGA
Solicitors for Plaintiffs and
Appellants; Residence: Boise, Ida.

ON THIS DAY Came on for consideration the matter of approval of the statement of the evidence lodged by the plaintiff, and it appearing to the court that said statement was lodged and served within the time heretofore allowed therefor by the court, and after hearing counsel for the respective parties as to the matters that should be contained in said statement, the foregoing statement is settled as a true, complete and properly prepared statement under Equity Rule No. 75, and

IT IS ORDERED By the court that the same be, and is hereby, made a part of the record herein for the purpose of plaintiff's appeal to the Circuit Court of Appeals for this circuit.

Dated this 30th day of August, 1938.

CHARLES C. CAVANAH
District Judge

(Title of Court and Cause)

PETITION FOR APPEAL

Filed July 15, 1938

COME NOW E. H. Smith, D. N. McBrier, F. B. McBrier, Alice M. Bethel, Charles A. Owen, Morris K. Rodman, and Ethel W. Johnston, for themselves and others similarly situated, plaintiffs herein, and respectfully show that on the 23rd day of April, 1938 this court made and filed its Findings of Fact and Conclusions of Law and entered a Decree herein by which it found, decided, adjudged and decreed that there were due and outstanding certain bonds for improvements made in Local Sidewalk and Curb Improvement District No. 38 of said Boise City, of the aggregate principal sum of $37,000.00, with interest thereon from the 1st day of January, 1932 at the rate of 7% per annum, and judgment was entered against said defendant, Boise City, for the sum of $6,846.17, together with costs of said action and interest on said amount at the rate of 6% per annum from the 23rd day of April, 1938, said sum of $6,846.17 and interest thereon to be prorated between the holders of said bonds aggregating, as aforesaid, the said principal sum of $37,000.00, in which Findings of Fact, Conclusions of Law and decree, and the proceedings had prior thereto in this cause, certain errors were committed to the manifest prejudice of these plaintiffs, all of which

appears more fully and in detail from the Assignment of Errors filed with this petition;

WHEREFORE, These plaintiffs pray that they may be allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DATED At Boise, Idaho, this 15th day of July, 1938.

OLIVER O. HAGA
RICHARDS & HAGA
Solicitors for Plaintiffs

ORDER ALLOWING APPEAL

AND NOW, To-wit: On the 15th day of July, 1938, IT IS HEREBY ORDERED That the above and foregoing petition for appeal be, and it hereby is, granted, and the said appeal allowed, as prayed for, upon plaintiffs giving bond, as required by law, in the sum of $300.00, and that the bond for said sum, submitted by plaintiffs with said petition, be and the same hereby is in all respects approved.

CHARLES C. CAVANAH
District Judge

(Title of Court and Cause)

ASSIGNMENT OF ERRORS

Filed July 15, 1938

COME NOW E. H. Smith, D. N. McBrier, F. B. McBrier, Alice M. Bethel, Charles A. Owen, Morris K. Rodman, and Ethel W. Johnston, for themselves and others similarly situated, plaintiffs in the above entitled cause, and, in connection wtih their said petition for appeal herein, say there are manifest errors in the record, proceedings, findings and decree herein, and they assign in particular the following errors:

I.

That the court erred in not holding and deciding that plaintiffs were entitled to judgment for the principal amount of the bonds held by said plaintiffs, to wit: $37,000.00, with interest thereon at the rate of 7% per annum from the 1st day of January, 1932.

II.

That the court erred in not holding and deciding that the defendant, Boise City, had failed to comply with the provisions of Section 49-2725, Idaho Code Annotated 1932, which provides in substance and effect that all bonds of Local Sidewalk and Curb Improvement District No. 38 of Boise City were equal liens

upon the propoerty for the assessments represented by such bonds, without priority of one over another, and in not holding that all collections made under such assessments should have been paid and applied pro rata on all bonds issued, to wit: $56,539.10, and in not holding that said Boise City and its officers had wrongfully and in violation of law, redeemed and paid at par $19,539.10 of said bonds, with interest to date of redemption.

III.

That the court erred in not holding and deciding that the defendant Boise City was liable to plaintiffs for the excess, over their pro rata share, paid to the holders of the $19,539.10 of such bonds that were redeemed and paid in full.

IV.

That the court erred in not entering judgment against the defendant Boise City in favor of plaintiffs for the difference between the said sum of $19,539.10, paid to the holders of the bonds so redeemed, as aforesaid, and the pro rata share of the assessments to which such bondholders were legally entitled under the laws of the State of Idaho.

V.

That the court erred in holding and deciding that plaintiffs were entitled to judgment against the defendant Boise City only for the sum of $6,846.17, together with costs of the action, and interest thereon from the

date of the decree herein at the rate of 6% per annum.

WHEREFORE, Plaintiffs pray that the decree of the District Court, entered herein, may be modified and the District Court directed to enter judgment in favor of plaintiffs, for the principal sum payable under their said bonds, with interest thereon from January 1, 1932.

OLIVER O. HAGA
RICHARDS & HAGA
Solicitors for Plaintiffs,
Residence: Boise, Idaho

(Title of Court and Cause)

BOND ON APPEAL

Filed July 15, 1938

KNOW ALL MEN BY THESE PRESENTS: THAT, WHEREAS E. H. Smith, D. N. McBrier, F. B. McBrier, Alice M. Bethel, Charles A. Owen, Morris K. Rodman, and Ethel W. Johnston, for themselves and others similarly situated, have perfected, or are about to perfect, an appeal from the decree made and entered in said cause, and whereas said plaintiffs desire to give a bond for costs on appeal,

NOW, THEREFORE, The undersigned, American Surety Company of New York, a corporation organized under the laws of the State of New York

and duly authorized to do a surety business in the State of Idaho and to become sole surety on bonds and undertakings, does hereby bind itself and its successors and assigns in the principal sum of Three Hundred ($300.00) Dollars, to the said defendants Boise City, a municipal corporation, and Thomas F. Rodgers, as City Treasurer of said Boise City, for the payment of all costs which said defendants or either of them may sustain, not exceeding in the aggregate the sum of Three Hundred ($300.00) Dollars, if the said plaintiffs shall fail to prosecute their said appeal to effect and answer all costs that may be assessed or taxed against said plaintiffs in favor of said defendants, or either of them.

IN WITNESS WHEREOF, Said American Surety Company of New York has caused its name to be hereunto subscribed by its duly authorized attorney-in-fact and agent, this 15th day of July, 1938.

AMERICAN SURETY COMPANY
OF NEW YORK
By A. J. GAMBLE
Its Attorney-in-Fact

Countersigned:

By TYLER WILLIAMS
Resident Agent.

(SEAL)

(Title of Court and Cause)

CITATION

Filed July 15, 1938

UNITED STATES OF AMERICA) SS.

TO BOISE CITY, a municipal corporation, and THOMAS F. RODGERS:

YOU ARE HEREBY CITED AND ADMONISHED To be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States, for the District of Idaho, Southern Division, in a suit wherein E. H. Smith, D. N. McBrier, F. B. McBrier, Alice M. Bethel, Charles A. Owen, Morris K. Rodman, and Ethel W. Johnston, for themselves and others similarly situated, are appellants, and you are appellees, to show cause, if any there be, why the judgment and decree rendered in said cause in said District Court should not be modified and corrected and speedy justice done.

WITNESS The Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, Southern Division, this 15th day of July, in the Year of Our Lord One Thousand Nine Hundred Thirty-Eight, and of the Independence of the United States

One Hundred Sixty-Four.

CHARLES C. CAVANAH
District Judge

ATTEST:
W. D. McReynolds
Clerk
(SEAL)

SERVICE of the foregoing Citation, and receipt of two copies thereof,

ADMITTED this 15th day of July, 1938.
THORTON D. WYMAN
Z. REED MILLAR
Solicitors for Defendants.
Residence: Boise, Idaho.

(Title of Court and Cause)

PRAECIPE FOR RECORD ON APPEAL
Filed July 15, 1938

To W. D. McREYNOLDS, Clerk of the above-entitled Court:

YOU WILL PLEASE Prepare the record upon the appeal taken by the undersigned in the above entitled cause from the Decree entered therein on the 23rd day of April, 1938, such record to consist of the following pleadings and documents, to-wit:

Bill of Complaint as amended;

Answer of Defendants as amended, omitting the parts thereof stricken out by the Court on plaintiff's motion;

All motions and requests made by plaintiffs for orders directing the defendants to make and file an account;

All objections filed by plaintiffs to accounts made and filed by defendants;

The statement of the evidence settled and allowed by the Court or Judge under Equity Rules Nos. 75 and 76, or any agreed statement under Equity Rule 77;

Opinion of the Court;

Findings of Fact and Conclusions of Law;

Decree;

All papers in connection with the appeal of these Appellants, viz:

Petition for Appeal
Assignment of Errors
Bond on Appeal
Order Allowing Appeal and Approving Bond
Citation
This Praecipe.

In preparing the above record, you will please omit the title to all pleadings except to the Complaint as finally amended, and instert in lieu thereof "Title of court and cause" followed by the name of the pleading or instrument.

DATED This 15th day of July, 1938.

OLIVER O. HAGA
RICHARDS & HAGA
Solicitors for Plaintiffs.
Residence: Boise, Idaho.

SERVICE of the foregoing Praecipe, Petition for Appeal, Assignment of Errors, Bond on Appeal, and Order Allowing Appeal, and receipt of copies thereof, ADMITTED this 15th day of July, 1938.

THORNTON D. WYMAN
Z. REED MILLAR
Solicitors for Defendants.
Residence: Boise, Idaho.

(Title of Court and Cause)

CERTIFICATE OF CLERK

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 106 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $130.60 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 17th day of September, 1938.

W. D. McREYNOLDS,

(SEAL) Clerk

No. 8981

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN AND ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLANTS' BRIEF

On Appeal from District Court of the United States for District of Idaho, Southern Division.

RICHARDS & HAGA,
Attorneys for Appellants,
Residence: Boise, Idaho.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

No. 8981

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN AND ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

VS.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLANTS' BRIEF

On Appeal from District Court of the United States for District of Idaho, Southern Division.

RICHARDS & HAGA,
Attorneys for Appellants,
Residence: Boise, Idaho.

SUBJECT INDEX

TABLE OF CASES

TEXTBOOKS AND ENCYCLOPEDIAS

STATUTES

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN AND ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants*,

VS.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees*.

APPELLANTS' BRIEF

STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

Appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

STATUTORY PROVISIONS SUSTAINING JURISDICTION:

This Court has jurisdiction of the appeal under Sec. 128, Judicial Code as amended (Title 28, Sec. 225, U.S.C.).

Diversity of citizenship is alleged in the complaint (R. 12) and admitted by the answer (R. 29).

APPEAL WAS TAKEN IN TIME:

Decree dated and filed April 23, 1938 (R. 63).

Appeal allowed July 15, 1938 (R. 97).

JURISDICTIONAL AMOUNT IS INVOLVED:

Suit in equity for accounting and money judgment (R. 23-25).

Amount in controversy, $37,000 (R. 15, 29).

Judgment for $6,846.17 (R. 63-4).

STATEMENT OF THE CASE

Appellants are the owners of $27,500, par value, of bonds issued by Boise City for improvements in Local Sidewalk and Curb Improvement District No. 38. The suit was brought on behalf of appellants and all others similarly situated. The amount of bonds issued for said Improvement District aggregated $56,539.10 (R. 55-57), of which bonds numbered 1 to 39, inclusive, of the par value of $19,539.10 were redeemed before maturity, at par and accrued interest (R. 59), leaving a balance still outstanding of $37,000, of which, as stated above, $27,500 are held by appellants and the balance of $9,500 by parties whose names and addresses are unknown to either appellants or appellees.

The bonds bear date of January 1, 1922 (R. 25-28),

and were payable on or before January 1, 1932; interest 7% per annum, which was paid to January 1, 1932.

Appellants presented their bonds for payment to the City Treasurer who refused payment thereof because there was only $2,817.57 in the fund in his custody available for the payment of the bonds and interest (R. 15, 29).

Appellants brought suit in equity for an accounting by the city as statutory trustee for the bondholders. The complaint alleges in considerable detail negligence and carelessness and wrongful acts on the part of the officers of Boise City, in the levying of the assessments for the payment of the bonds, in the collection of the assessments, in the certification of the assessments to the county after the same became delinquent, and in the misappropriation and diversion of the assessments collected.

Among other things it is alleged that for a period approximating 10 years the City Clerk had diverted and appropriated to her own account over $92,000 of the funds of the city, including over $21,000 of the assessments collected for the payment of appellants' bonds (R. 16-17); that Boise City had permitted its books and records to be kept in an inadequate and inefficient manner by negligent, incompetent and untrustworthy employees; and that the system of accounting employed by the city was wholly inadequate for the protection of the funds which the city held in trust for appellants and other bondholders; that the amount which the trustee had collected under the assessments levied for the payment of appellants' bonds, and the condition of the assessments, delinquencies,

etc., could not be ascertained or determined without an accounting being rendered by the city as statutory trustee (R. 22-23); that the city had wrongfully paid the holders of bonds numbered 1 to 39, inclusive, the full or face amount of their bonds, which was greatly in excess of the pro rata or equitable share of the moneys collected and that can be collected for the payment of all of said bonds; that the officers of the city knew, or should have known, of the wrongful acts complained of; that the city had compromised for $14,500 its claim against the sureties on the City Clerk's bond, but had not placed any of the moneys received on such settlement in the fund for the payment of appellants' bonds (R. 17-22); that the city should be held liable for the loss resulting to the bondholders from the careless, negligent and wrongful acts of the city and its officers.

And appellants accordingly prayed judgment against the city for any deficiency there might be in the fund for the payment of the bonds issued on account of said Improvement District.

The sufficiency of the complaint, and the right of appellants to an accounting, were determined by the District Court on appellees' motion to dismiss. That decision is reported in 18 F. Supp. 385.

After answer filed (R. 29-36) and no account being rendered by the city, the Court on appellants' motion (R. 37) ordered that an account be furnished (R. 38-39).

Pursuant to that order appellees filed what they designated "First Report and Account" (R. 79-84).

The report was incomplete and inadequate and not

in compliance with the Court's order, and appellants therefore moved for a further report (R. 40).

Whereupon appellees' filed what they designated "Supplemental Report and Account" (R. 84-90), to which appellants again objected and requested a further and more complete report (R. 41-42).

Appelles then filed what they designated their "Second Supplemental Report and Account" (R. 90-94), to which appellants again objected and requested a further report (R. 43).

In view of the apparent impossibility of obtaining a complete accounting, appellants proceeded with the trial of the case, after which the Court rendered its opinion on the merits (R. 44-54), and thereupon findings of fact and conclusions of law were made and filed (R. 54-63), and decree entered (R. 63-65) giving appellants judgment for $6,846.17, the same to be prorated over all bonds outstanding—$37,000.

In brief, appellants contend:

(a) That the burden of proof was on Boise City as statutory trustee to show that it had discharged the duties of trustee according to law; that it was liable for all funds for which it could not properly account, and for all losses resulting from the improper performance of its duties; that it failed wholly to sustain the burden of proof which the law of accounting places on a trustee; that the Trial Court proceeded on the assumption that the burden was on appellants to show the city's failure to properly perform its duties and conserve the trust funds, and the losses resulting therefrom;

(b) That as to funds wrongfully diverted and not placed in the trust fund as and when the same should have been placed therein, the city should pay interest at the legal rate—6%;

(c) That if judgment be not entered against the city *for the full amount due appellants,* then the city should be required to reimburse the trust fund, by the amount which it overpaid the holders of the first 39 bonds which were paid in full when it was obvious that there would be a deficit and that other bondholders would not receive the full amount due them. This would require the city to reimburse the trust fund by about $10,420.

SPECIFICATION OF ERRORS

The assignment of errors sets out in some detail a number of errors (R. 98-100). In brief, they are:

I

That appellants were entitled to judgment for the full amount of bonds outstanding with interest at the rate of 7% per annum from January 1, 1932, because appellees failed to show by the accounts rendered that the losses in the trust fund were not caused by the negligence, carelessness or wrongful acts of the city or its officers; or stated otherwise, where a trustee has kept his accounts in such a negligent and careless manner that he is unable to show that he has properly performed his duties and complied with the law relating thereto, the presumption will be against the trustee on settlement, and he will be charged with what he can not account for.

II

Sec. 49-2725, Idaho Code Annotated, 1932, provides that the bonds issued for said Improvement District "shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land."

The security was accordingly held for the equal and pro rata benefit of all bonds; hence, when the city paid bonds numbered 1 to 39, inclusive, aggregating $19,539.10, in full with accrued interest, and the security then remaining was sufficient to pay only about 18½ per cent of the face value of the remaining bonds, without interest after January 1, 1932, it violated its obligations to the holders of the bonds not redeemed. By its actions it wrongfully diverted and applied their security to the holders of the bonds that were redeemed and paid in full. Had the security been prorated as required by statute, appellants would have received 46⅔ per cent of the face of their bonds instead of 18½ per cent. This wrongful act on the part of the city results in a loss to appellants and the holders of the other outstanding bonds of fully $10,420. Unless the city be required to pay all bonds in full the judgment should, in any event, be increased by the amount of $10,420.

III

The Court also failed to allow appellants interest on the money which the city or its officers had wrongfully diverted or withheld from the trust fund. On the basis of the judgment of the District Court, appellants should have had interest on over $4,000 for more than five years.

SUMMARY OF THE ARGUMENT

Liable for Defalcation of Officers

1. A municipal corporation in Idaho, in making improvements for the payment of which special assessment bonds are issued, acts in its proprietary capacity, and the rule applicable to private trustees applies to the city and renders it responsible for defalcations and wrongdoings of its agents and officers.

Cruzen vs. Boise City, 58 Idaho ...., 74 Pac. (2d) 1037, 1038.

Smith vs. Boise City, 18 F. Supp. 385.

Appellees Required to Render Account

2. A municipal corporation, acting as statutory trustee, may be required to account as any other trustee, and it is bound to the exercise of due diligence in collecting according to law and enforcing the statutory remedies intended for the benefit of the bondholders through the machinery which the law has created for such purpose. It is the agent of the owners of the bonds, and answerable for failure to perform its duty.

Jewell vs. City of Superior (C.C.A. 7), 135 Fed. 19.

Board of Education vs. Norfolk & Western Ry. Co. (C.C.A. 7), 88 Fed. (2d) 462.

Rothschild vs. Village of Calumet Park, 350 Ill. 330, 183 N.E. 337.

Spydell vs. Johnson, 128 Ind. 235, 25 N.E. 889.

Hayden vs. Douglas County (C.C.A. 7), 170 Fed. 24.

New Orleans vs. Fisher, 189 U.S. 185, 45. L. Ed. 485.

New Orleans vs. Warner, 175 U.S. 120, 44 L. Ed. 96.

Hauge vs. City of Des Moines, 207 Iowa 1207, 224 N.W. 520.

Boise City Is Liable for Losses Resulting From Its Negligence.

3. When a municipal corporation, having authority to make special improvements and to provide for the payment thereof out of special assessments, fails to levy the necessary assessments, or misappropriates or diverts the funds to other purposes, or otherwise so performs its duty that a loss results to the bondholders, the corporation becomes primarily liable to pay the debt.

Oklahoma City vs. Orthwein (C.C.A. 8), 258 Fed. 190, 195.

City of McLaughlin vs. Turgeon (C.C.A. 8), 75 Fed. (2d) 402, 410.

Gray vs. City of Santa Fe (C.C.A. 10), 89 Fed. (2d) 406.

Masters vs. Rainier, 238 Fed. 827.

Asphalt Paving Co. vs. Denver (C.C.A. 8), 72 Fed. 336.

District of Columbia vs. Lyon, 161 U.S. 200, 40 L. Ed. 670.

Rogers vs. Omaha, 82 Neb. 118, 117 N.W. 119.

North Pac. Lumbering & Mfg. Co. vs. East Portland, 14 Ore. 3, 12 Pac. 4.

Com. Nat'l Bank vs. Portland, 24 Ore. 188, 33 Pac. 532.

Dime Deposit & Disc. Bank vs. Scranton, 208 Penn. 383, 57 Atl. 770.

Dale vs. Scranton, 231 Penn. 604, 80 Atl. 1110.

Denny vs. City of Spokane (C.C.A. 9), 79 Fed. 719.

Blackford vs. Libby, 103 Mont. 272, 62 Pac. (2d) 216.

4. Principles of justice and honesty fundamentally apply to individuals, municipalities, states and nation alike, and should be applied alike, unless constitutional and statutory provisions forbid. The great weight of authority holds the city liable for losses sustained through neglect or refusal to levy assessments and perform the duties imposed upon it in connection with the collection and safekeeping and lawful distribution of the moneys to the borrowers.

Henning vs. City of Casper, 50 Wyo. 1, 57 Pac. (2d) 1264, and authorities there cited.

Ward vs. City of Lincoln, 87 Neb. 661; 128 N.W. 24; 32 L.R.A. (N.S.) 163, and note.

5. The county treasurer is the agent of the city for the collection of special taxes, and it is the duty of the city to obtain from its agent the funds collected and to report what its agent has done to enforce collection of the assessments levied.

Hauge vs. City of Des Moines, 207 Iowa 1207, 224 N.W. 520.

Hauge vs. City of Des Moines (Iowa), 216 N.W. 689.

6. Sec. 49-2719, Idaho Code Annotated 1932, provides that the city "shall levy a special assessment each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments thereby levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included."

Appellees' report and account shows that the city levied for interest $21,750.25 (R. 79), and that it paid out as interest on bonds (R. 80) $31,932.88, and hence there was a deficit in the amount levied for interest of over $10,000.

Trustee Has Burden of Proof.

7. The burden of proof was on the city as statutory trustee to show that it had discharged the duties of the trust according to law and the rules governing trusteeships. It is liable for all funds for which it can not properly account and for all losses resulting from the improper performance of its duties, and all presumptions are resolved in favor of the beneficiaries.

65 C.J., page 904.

3 Pomeroy's Equity Jurisprudence, 4th ed., Sec. 1063.

Lupton vs. White, 15 Ves. 432.

4 Bogert on Trusts and Trustees, Secs. 962 and 963.

"The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust. * * * If the trustee fails to keep proper accounts, he is liable for any loss or expense resulting from his failure to keep proper accounts. The burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep proper accounts and vouchers may result in his failure to establish the credits he claims."

Vol. 1, Restatement of the Law on Trusts, Secs. 172 and 173.

Bone vs. Hayes, 154 Cal. 759, 99 Pac. 172.

Purdy vs. Johnson, 174 Cal. 521, 163 Pac. 893.

When Improvement District or Fund is Insolvent, Pro rata Payment Must Be Made to Bondholders

8. The assessments levied for the payment of improvement bonds and interest thereon are for the equal benefit of all bondholders, and the city can not legally pay the bonds in numerical order when it appears that the fund is or will be insufficient to pay all bonds in full. When insolvency appears the city must make payment pro rata on all bonds, otherwise it will be liable for the excess paid to any bondholder.

Sec. 49-2725, Idaho Code Annotated 1932.

Meyers vs. Idaho Falls, 52 Idaho 81, 11 Pac. (2d) 626.

Jewell vs. City of Superior (C.C.A. 7), 135 Fed. 19.

Board of Education vs. Norfolk & Western Ry. Co. (C.C.A. 7), 88 Fed. (2d) 462.

Howard vs. State, 226 Ala. 215, 146 So. 414, 419.

State vs. Little River Drainage Dist., 334 Mo. 753, 68 S.W. (2d) 671, 674.

State vs. Duncan, 334 Mo. 733, 68 S.W. (2d) 679, 683.

Morris, Mather & Co. vs. Port of Astoria, 141 Ore. 251, 15 Pac. (2d) 385.

6 McQuillin on Municipal Corporations, Sec. 2504, page 275.

Rothschild vs. Calumet Park, 350 Ill. 330, 183 N.E. 337.

1 Pomeroy's Equity Jurisprudence, 4th ed., Secs. 405-407.

Kerr Glass Mfg. Corp. vs. City of San Buenaventura, ... Cal. ....., 62 Pac. (2d) 583, 588.

Morris vs. Gibson, ... Cal. App. ....., 65 Pac. (2d) 956.

9. The rule is well settled that where the bonds are payable out of a fund based on an inexhaustible power of taxation under which the fund may be replenished by the further exercise of the power of taxation, neither law nor equity requires pro rata payment, even though the current fund is insufficient to pay the matured bonds and coupons. But where the bonds are payble out of a fund to be created under a limited or exhaustible power of taxation, the rule is otherwise, and when insolvency of the fund appears equity requires equality and pro rata payment.

Kerr Glass Mfg. Corp. vs. City of San Buenaventura, ...Cal. ....., 62 Pac. (2d) 583, 588.

Morris vs. Gibson, ... Cal. App. ....., 65 Pac. (2d) 956.

1 Jones on Bonds and Bond Securities, Sec. 511.

Rohwer vs. Gibson, 126 Cal. App. 707, 14 Pac. (2d) 1051.

Jewell vs. Superior (C.C.A. 7), 135 Fed. 19.

Snower vs. Hope Drainage Dist., 2 Fed. Supp. 931.

State vs. Little River Drainage Dist., 334 Mo. 753, 68 S.W. (2d) 671, 674.

The City Was Trustee Under an Active Trust

10. The trusteeship under which the city acted was an active trust as distinguished from a dry or passive trust, and it was its duty to be watchful of the interest of the beneficiaries and to observe the condition of the trust fund, and when the insolvency of the fund or the insufficiency of the assessments appeared, it was the trustee's duty to invoke the rule of pro rata payment, as in the case of private bonds.

Welch vs. Northern Bank and Trust Co., *100* Wash, *349*, 170 Pac. 1029.

1 Restatement of the Law on Trusts, Sec. 69a.

Interest on Funds Diverted

11. The city is liable for the payment of interest on

the wrongful diversion of trust funds from the time of such diversion, at the legal rate.

Cook vs. Staunton, 295 Ill. App. 111, 14 N.E. (2d) 696, 701.

Conway vs. City of Chicago, 237 Ill. 128, 86 N.E. 619.

Right of Bondholders to Foreclose is an Impracticable Remedy and Optional with Bondholders

12. Bondholders' right to foreclose assessments is optional and for bondholders' benefit, and failure to foreclose does not bar remedy against city for its wrongful act or neglect. The exercise of the remedy of foreclosure by one of a large number of bondholders is wholly impracticable. All bondholders have a proportional lien upon each separate piece and parcel, and their rights can not be foreclosed out by any one bondholder.

ARGUMENT

I

Issues Definitely Settled By Trial Court

The District Court held in its first opinion in this case, reported in 18 F. Supp. 385, that Boise City was statutory trustee for appellants. The Supreme Court of the state in a parallel case (Cruzen vs. Boise City, 58 Idaho ....., 74 Pac. (2d) 1037), decided shortly thereafter cited with approval the decision of the

District Court in the case at bar in support of the proposition "that the city is liable for the collection of the assessments, and that the general rule applicable to a private trust would apply, resulting in the responsibility of the trustee for the defalcation of his agent," and held the city liable to a bondholder of an improvement district, for wrongful diversion of of funds by the City Clerk.

We think the law is therefore settled in the State of Idaho that Boise City was statutory trustee and that it is liable for any violation of the law governing its trusteeship which results in a loss to the beneficiaries under the trust. Such was the holding of the District Court, and from that decision no appeal was taken by the city. The decision is fully sustained by the authorities cited under paragraph 3 of our "Summary of the Argument."

The District Court directed the city to render an account of its trusteeship for the reasons stated in the opinion. That decision is amply sustained by the authorities cited under paragraph 2 of our "Summary of the Argument." From that decision the city has not appealed.

These issues, originally contested by appellees, have accordingly been settled in favor of appellants and are not subject to review on this appeal.

II

Appellees Furnished Only an Incomplete, Partial and Fragmentary Account

The account, if it had been submitted with the full-

ness required, would have included a multitude of items covering transactions extending over a period of about 16 years—1922 to 1938. It should have contained the information necessary to enable the city officials and bondholders to determine therefrom the levies that had been made, the steps taken to collect, the amount collected and the application thereof, the amount paid and the amount still unpaid and delinquent, and the status of the delinquency on each piece and parcel of land in this improvement district, and what pieces and parcels had been sold for taxes and title thereto acquired by the county or others, so that they no longer would constitute a source of income for the payment of appellants' bonds. Without such information the widely scattered bondholders were helpless, and the data required was only such as the city should have kept in its records in order to properly discharge its duties as trustee for the bondholders.

The bonds recite (R. 27) that all things required to be done by the city to make them valid obligations had been done and performed, and,

> "that the cost and expenses of the said improvements which this bond has been issued to pay have been duly levied and assessed as special taxes upon all of the lots, pieces and parcels of land in said Local Sidewalk and Curb Improvement District No. 38, separately and in addition to all other taxes, and said special assessments are a lien upon said lots, pieces and parcels of land; that due provision has been made for the collection of said special assessments, together with interest

> on unpaid installments at the rate of 7% per annum sufficient to pay the interest thereon promptly when and as the same falls due, and also to discharge the principal hereof at maturity."

The city should accordingly be charged with the amount required to pay the bonds and interest, and it should be credited with: (a) the amount paid on principal and interest; (b) the amount legally levied and assessed but which could not be collected by and according to the machinery or procedure provided by law for the collection of such assessments.

The accounts rendered are so indefinite and uncertain as to the assessments made; the procedure followed in the collection thereof, and as to the amount actually collected and diverted to other purposes that no credit can be allowed except for what has been paid to the bondholders.

We concede that if the city followed the law in the making of the annual levies of assessments and in the collection thereof, it would not be liable for the failure of taxpayers to pay their taxes, and with that showing it would need to account only for the amount actually received from the taxes which it was required to levy, assess and collect under the procedure prescribed by statute.

If the city, in its account, could show losses resulting without any fault or neglect on its part because of the failure of taxpayers to pay, and because the lots assessed could not be sold for enough to yield the amount of the assessment against them, it would be entitled to credit for such losses, but the accounts

furnished were so inadequate and incomplete that it was impossible to determine therefrom whether it had taken any lawful step to carry out the duties imposed upon it as trustee, and to what credits it would be entitled. In support of this statement we need only refer to the reports furnished (R. 79-94) and to the comments of the city's accountants on the condition of its books (R. 67-79). See also the Findings of Fact (R. 56-57).

III

Errors in Decision of Trial Court

What we consider as the errors in the decision of the District Court may be classified into three parts:

a) Failure to render judgment for appellants for the full amount claimed, in view of the failure of the city to make a proper account showing that it was entitled to any credits, except for what had actually been paid to the bondholders.

b) Refusing to require the city to reimburse the trust fund by the excess payments made to certain bondholders whose bonds had been paid in full when it was obvious that the trust fund was insolvent.

c) Failing to allow the items claimed in excess of $6,846.17—the amount of the judgment rendered.

We shall now direct our attention to the first assignment of error, which reads as follows (R. 98):

> "That the Court erred in not holding and deciding that plaintiffs were entitled to judgment for the principal amount of the bonds held by said plaintiffs, to-wit: $37,000.00, with interest thereon

at the rate of 7% per annum from the 1st day of January, 1932."

The findings of fact (R. 54-62) are reasonably full, but the conclusions of the Court are based on the erroneous theory that losses to the trust fund, not clearly shown as having resulted from the wrongful acts of the city or its officers or employees, should not be charged against the city. Either consciously or unconsciously, the Court threw the burden of proof upon appellants, while we think according to well-established principles the burden was on appellees.

Before discussing the burden of proof, we wish to call attention to some of the facts found by the Court:

a) That losses resulted from the failure of the city to keep accurate records and because of the negligent, careless and inefficient manner in which the books and records of the city were kept (R. 57);

b) That the principal amount of bonds issued was $56,539.10, but that the amount actually levied for payment of principal was only $56,493.62, leaving a deficit in the levy for payment of principal of $45.48 (R. 57);

c) That the amount paid for interest on bonds was $31,932.88 (R. 57 and 59);

d) That the amount *levied* for payment of interest was only $21,750.25 (total of the interest column, R. 58 and 59, also shown on Exhibit A attached to appellees' Second Supplemental Report, R. 94), thus leaving a deficit in the interest fund of $10,182.63;

e) That instead of redeeming bonds to the principal amount of $5,649.36 each year commencing with

the close of the year 1922, as proposed in the financial set-up on which the assessments were based (R. 58) and bonds issued, the city actually redeemed (R. 59) only $2,039.10 in 1923, $2,500 in 1924, $4,500 in 1925, $3,000 in 1926, $3,000 in 1927, none in 1928, $1,500 in 1929, $2,000 in 1930, and $1,000 in 1931, or a total of $19,539.10 during the period in which it should have redeemed—according to its assessment schedule—$56,539.10.

From the Court's findings and the reports and accounts filed by appellees, the following conclusions are inevitable: That the records kept by the city were so inaccurate, inadequate, or obviously false that the diversions and misappropriations of the fund could not be correctly ascertained; or, *that the fund was insolvent from the beginning.*

A.

The Burden of Proof Was on the Trustee

At the opening of the trial counsel for appellants called to the Court's attention the insufficiency of the reports or accounts which appellees had furnished. Among other things, counsel said:

> "* * * In regard to these reports plaintiffs complain and show that the defendants have failed to comply with the orders of this Court requiring them to make a full and true account of the acts of Boise City as statutory trustee for the bondholders of Local Sidewalk and Curb Improvement District No. 38; that the reports sub-

> mitted by the defendants are in many instances evasive, conflicting and inconsistent, and the first two reports purport to be based upon, or made from, information or data contained in the audit of Lybrand, Ross Brothers & Montgomery, certified public accountants, but the report or audit of said certified public accountants has not been submitted or filed in this cause, so that the correctness of the partial and incomplete report submitted by the defendants can be verified or checked, or the correctness thereof determined by this Court; * * *"

Counsel further stated his understanding of the law of accounting in cases of this kind, and that the burden of proof was on appellees.

Thereupon the trial proceeded as set forth in the record (pp. 66-94).

In 65 C.J., page 904, the rule is stated as follows:

> "(§ 799) d. *Evidence.*—(1) *Presumptions and burden of proof.* In an action for an accounting against a trustee, plaintiff has the burden of proving the existence of a trust, and, ordinarily, the receipt by the trustee of some property impressed with the trust, and, under some circumstances, the amount of the property so received. After such facts going to make out the existence of the duty to account have been proved by plaintiff, the burden is then on the trustee to make or prove a proper and satisfactory accounting of the funds coming into his hands; so, if he claims allowances

or credits; he must prove them. If he does not do so, every intendment is against him; and every item of charge or credit whose correctness the trustees do not support by satisfactory evidence must be disallowed. Similarly, if circumstances showing waiver or estoppel are pleaded as a defense, the trustee has the burden of proving them. It is not necessary for plaintiff, in order to maintain the suit, to show affirmatively that there has been a failure to account for money or property belonging to him, or even that anything will be found due on the accounting, nor to prove negatively a failure of the trustee to perform his duty to account; and he is not under the burden of disproving the items of the account presented.

"*Matters of Discharge* set up by the trustees as a defense to the action in whole or in part must be proved by them. Thus, when payment is relied on, it must be shown; where it is shown that a trust has existed and there has been no settlement thereof during the life of the trust, the beneficiaries are prima facie entitled to an accounting; the presumption is that they have not been paid, and the fact that the trustee has expressly so declared as to some of them does not affect the force of the presumption as to others not mentioned in such declaration. Similarly, when a trustee seeks to convert the trust funds or a portion thereof in his hands into an ordinary debt, or a loan from his cestui que trust to himself, he must do so by clear and satisfactory evi-

dence; the presumptions are all against him, and the burden of showing good faith in the transaction is on him."

In 3 Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 1063, the author says:

"*The Duty to Account.*—As a branch of the general obligation of carrying the trust into execution, a trustee is also bound to act for all the trust property. He must not only render a full account of his conduct at the time of final settlement, but it is one of his most imperative duties to keep regular and accurate accounts during the whole course of the trust of all property coming into, passing out of, or remaining in his hands. These accounts must clearly distinguish between the trust property and his own individual assets; for the two should never be mingled in the accounts nor in use; they should show all receipts and payments, and should at all times be open to the inspection, and produced at the demand of the beneficiary."

In the notes to the above section, the author cites authorities in support of the following statements:

(a) Failure to keep full or accurate accounts raises all presumptions against the trustee; it may subject him to pecuniary loss by rendering him liable to pay interest, or chargeable with moneys received and not duly accounted for.

(b) If the trustee negligently fails to keep true account, or fails to account, all presumptions are against him.

(c) The trustee must keep strict and accurate account and the burden is on him to show the amount of receipts and expenditures.

(d) Where the account has been kept in a negligent manner the presumption will be against the trustee on settlement.

(e) As a general rule, where the omission of the trustee to account is due to mere negligence without any actual intent to defraud, simple interest is allowed the cestui que trust, on the trust funds; but if the omission is wilful, compound interest is allowed.

The early English case (1808) of Lupton vs. White, 15 Ves. 432, is frequently cited by the authorities on the responsibility that rests on a trustee to make full and accurate accounts. In that case the Lord Chancellor, in discussing the right of plaintiff to an accounting and the fullness of the account, says:

"If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was, not merely under an implied moral obligation, but pledged by solemn undertaking in a court of justice, that such should not be the state of things between them, by those means preventing the guard, which the court would have effectually interposed, is the argument to be entered, that,

if the party, so injured, can not distinguish his property, therefore he shall have nothing? That is not the law of this country; as administered in courts either of law or of equity. * * *

"A principle, not dissimilar, though not precisely the same, governed me in the case of Mr. Jackson's executors. There was no more duty imposed upon him than upon these individuals. He had kept the account, and, as it appeared to me, not incorrectly, upon his own side; but, having kept it only upon his own, though bound to keep it upon the other side, it was held, that he could not maintain a demand, to which under the circumstances he would have been fairly entitled. The decision was made, not upon the notion that strict justice was done, but upon this, that it was the only justice that could be done; and that no more could be done was the fault of Jackson himself; who, if he did not enable those parties to know, what demand they had upon him, could not be heard to say, he had any demand upon them."

In 4 Bogert on "Trusts and Trustees," Section 962, the author says:

"§ 962. *Duty to Keep Records.*

"It is the duty of the trustee to keep full, accurate, and orderly records of the status of the trust administration and of all acts thereunder. He can not comply with his duty to furnish informal information to the cestui, or with his duty to give

a formal statement of trust affairs on an accounting proceeding, without laying a foundation therefor by setting up a bookkeeping system and preserving receipts or vouchers and other similar documents.

"'To keep an accurate account is one of the primary duties of a trustee.' 'The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expenditures which he claims to have made were correct, just and necessary. * * * He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him.' This common-law duty is sometimes restated in statutory form. * * *

"* * * No trustee should rely on scattered informal notes, as in the case of entries in a diary.

* * * * * * *

"The principal penalty usually stated to apply to a trustee who fails to keep proper records of his trust is that 'all presumptions are against him' on his accounting, or that 'all doubts on the accounting are resolved against him.' He has the burden of showing on the accounting how much principal and income he has received and from whom, how much disbursed and to whom, and what is on hand at the time. If he claims that he received less than the cestuis allege he received, and has no written records to back his claim due to his own faulty system of keeping

accounts, the court will be strongly inclined to charge him with the sum he is alleged to have received. If he claims that he made payments to creditors or cestuis, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow the item. Had the trustee performed his duty by taking receipts or vouchers, he could have made a clear case for the disbursements. His failure to present such evidence casts suspicion on the claim and renders the court unwilling to hold that he has borne the burden of proving the payment by a preponderance of the evidence.

* * * * * * *

"If the trustee claims that he kept an account book but that he has lost it, it has been held that he must bear the burden of proving the payments which he alleges were shown by the book, and that doubts will be resolved against him. In one case where the trustee intentionally destroyed books and papers which he claimed showed expenditures, the court allowed him nothing on account of the alleged disbursements."

And in Section 963, Mr. Bogert says:

"§ 963. *Duty to Render Formal Account in Court of Equity.*

"The trustee also owes his cestui *a duty to render at* suitable intervals and *at the end of the*

trust a formal and detailed account of his receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the present status of the trust property then is. The trustee can be compelled by the court of chancery to perform this duty by presenting an account in that court, where it can be subject to the scrutiny of the court and its officers, as well as to criticism by the cestui and other interested parties. * * *

"In order to succeed in such a suit for accounting, it is not necessary that the cestui allege that there is any sum immediately due him under the trust, or that the trustee is in default. *The suit is one to obtain information concerning the course of administration, no matter what the present status is.*" (Our *italics.*)

To the same effect are the rules adopted by the American Law Institute and set out in the "Restatement of the Laws of Trusts," see particularly Sections 172 and 173, Volume 1. In Section 172, the text says:

"The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust. * * *

"If the trustee fails to keep proper accounts, he is liable for any loss or expense resulting from his failure to keep proper accounts. *The burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep*

proper accounts and vouchers may result in his failure to establish the credits he claims." (Our italics.)

The subject is discussed and the foregoing rules applied by the Supreme Court of California in Bone vs. Hayes, 159 Cal. 759, 99 Pac. 172. The Court there says:

> "Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund (3 Pom. Eq. Jur. § 1063; 28 Am. & Eng. Ency. L [2d Ed.]) 1076), and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee upon a settlement (Lupton vs. White, 15 Ves. 432, 440; Blauvelt vs. Ackerman, 23 N.J. Eq. 495; Landis vs. Scott, 32 Pa. 495)."

In the later case of Purdy vs. Johnson, 174 Cal. 521, 163 Pac. 893, the Supreme Court of California comments more at length on the procedure and burden of proof in cases of accounting by trustees. After quoting with approval the statements set out above from Bone vs. Hayes, the Court says:

> "(3) The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirma-

tively the impropriety of the charges and credits which she assailed. Such is not the law."

The Court then refers to the proof in the case and the argument on the part of the trustees and then adds:

"The fault in this argument is that which we have already mentioned as permeating the entire proceeding, viz.: that it is assumed that the burden is upon the beneficiary to disprove the correctness of items in the account, whereas, in fact, the burden is upon the trustees to prove that charges made by them are proper."

The Court then refers to the fact that the case had to be remanded for the taking of a new account, either by the Court or by reference, and then adds:

"But whichever mode is followed, the account should be stated in accordance with the rules to which we have adverted, i.e., that it is the duty of the trustees to support every item of their account, and that, wherever they fail to support the correctness of a charge or a credit by satisfactory evidence, the item must be disallowed. *It is probable that, upon any such settlement of the account, these trustees will be compelled to forego repayment of sums which they have properly and in good faith expended for the trust, and that they will be charged as having received money in cases where they have not, in fact, received it, and could not with reasonable diligence have received it. But, if this be the*

result, it will follow from the failure and neglect of the trustees to perform their duty of keeping full and accurate accounts of their transactions. Their good faith can not save them from the consequences of this neglect. Whatever doubts arise from their failure to keep proper records or their inability to establish the items of their accounts must be resolved against them." (Our italics.)

B.

Analyses of Reports and Accounts Furnished by Boise City

That it was impossible to obtain a correct account from the fragmentary, incomplete, and untrustworthy, and in many instances absolutely false records kept by the defaulting City Clerk is clearly apparent from the report made by Lybrand, Ross Brothers and Montgomery, who in 1934, at an expense to the city of over $30,000 (R. 35), audited the books of the city for the period that the bonds were outstanding. Pertinent excerpts from this report were admitted in evidence and are set out in the record (R. 67-78).

Appellees' first report dealt entirely with generalities and lump-sum figures (R. 79-83). The second or supplemental report (R. 84-93), made pursuant to appellant's motion for a fuller report (R. 40), attempts to make a break-down of the amounts stated in the first report (R. 82) of $2,242.92 admitted as embezzled by the city clerk, and of the item of $800.11 which the city's accountants reported as being noted as "unpaid and overdue" on the city's books but not certified

as delinquent to Ada County (R. 78). Also the item of $353.16 which the accountants reported as "shown paid on rolls in excess of amounts of duplicate receipts" (R. 78).

The second or supplemental report also attempts to furnish partial and fragmentary information as to the present status of delinquent assessments which had been certified to the county for collection. The report claims appellees could furnish that information for only the years 1928, 1929, 1930, and 1931. The "grand total" of these delinquencies is shown on page 90 as amounting to $9,732.68.

The Second Supplemental Report (R. 90-94) is a reclassification of items contained in the first report, with a break-down (Exhibit "A," R. 94) of the annual assessments, annual certifications to the county and annual payments to bondholders of principal and interest.

Exhibit A (p. 94) deserves more than passing notice. It shows that the city made its set-up on the assumption that one-tenth of the entire bond issue (less $45.48, for which no levy was ever made) would be paid on January 1 of each calendar year commencing January 1, 1923, and that the interest levied could be reduced accordingly. This assumption was without any basis of fact to sustain it. On the lower part of Exhibit A will be found the date on which payments were made for the redemption of bonds and the amount of bonds redeemed annually. Obviously, as bonds were not redeemed they continued to bear interest. The actual maturity of all bonds was January

1, 1932, but they were payable "on or before." Any delay in the redemption of bonds would increase the amount required for interest and thus create a deficit in the trust fund unless the assessments were increased accordingly.

Reverting again to the schedule on the upper part of Exhibit A, we see that the delinquency in the collection of assessments in the first year was over 58%. In the second year it was slightly under 50%; in the third year, over 55%, and it rose to about 80% in 1930. These distressing delinquencies during a period of prosperity apparently gave no concern to the trustee who applied the meager collections to the redemption of bonds at par and ignored the obvious fact that there would be no funds with which to pay the remaining bonds.

Attention is called to the column headed "Penalty." Under Sec. 49-156, Idaho Code Annotated, set out in the Appendix to this brief, a penalty of 10% was required to be added when an assessment became delinquent. It will be noted that in no case was the penalty added actually 10% of the delinquency. We note also that after 1925 no penalty whatsoever was added, although the same statute continued in force and effect.

The column headed "Certified to County" should be the sum of the penalty and delinquency, but in no case does it correspond. In some cases it is larger and in some cases less than the sum of the preceding two columns.

After the city discontinued adding penalties, the

amount of the delinquency in no case corresponds to the amount certified to the county. Sometimes it certified more than was delinquent, and sometimes less.

The 10% penalty that was not added to the delinquencies certified to the county aggregated $2,698.87. The failure of the city to add the penalty was a direct violation of the statutes, and for that amount the city is liable.

The errors in the amount certified to the county are of such character that on the face of the reports and accounts made by the city they might invalidate the assessments and be a contributing cause to the failure of taxpayers to pay.

In discussing tax penalties the Circuit Court of Appeals for the Eighth Circuit, in Ritterbusch vs. Atchison T. & S.F. Ry. Co., 198 Fed. 46, 53, said:

> "One who would enforce a penalty for the failure to pay a claim must demand the true amount. If he demands a larger amount no penalty is incurred."

To the same effect is the decision of the Court in State vs. Superior Court, 93 Wash. 433, 161 Pac. 77.

Clearly the county treasurer had no authority under the law to change the amount of the tax to be collected. The treasurer was charged with the duty of collecting what the city certified, and if a taxpayer tendered less the county treasurer would be compelled to refuse acceptance of the tender and there could be

no valid sale for the failure of the taxpayer to pay an illegal exaction if he had tendered the correct amount.

In view of the reports rendered and the absolute impossibility of reconciling the facts and figures contained in the reports; and in view of the condition of city's records as shown by the reports filed by appellees and by the report of the city's accountants, we respectfully contend that the city has failed to sustain the burden of proof; that it has failed to show by trustworthy proof that it is entitled to credit for the amounts for which it has failed to account and for which it in effect claims it can not account because of the condition of its records.

It is obvious from Exhibit A that there was neglect in the prompt application of funds to the payment of bonds. Only twice were bonds paid in January, and then only a thousand dollars at a time. Payments were usually made in July, and once as late as September. These delays resulted in increasing the interest payments, which, because of the delay in making redemptions aggregated, according to the reports, $10,034.14 more than the interest would have amounted to if the bonds had been redeemed promptly on the first of January as contemplated by the schedule.

We therefore contend that the Court should have entered judgment against the city for the full amount of the bonds outstanding, and interest thereon from January 1, 1932.

A very full review of the authorities noting changes in decisions and statutes will be found in the recent decision of the Supreme Court of Wyoming, in the

case of Henning vs. City of Casper, 50 Wyo. 1; 57 Pac. (2d) 1264.

C.

Interest on Funds Diverted

Incidentally we desire to call attention to the failure of the District Court to require the city to pay interest on the funds which it had wrongfully diverted, and which, according to the Trial Court's decision, aggregated about $4,000. The money diverted should have been placed in the trust fund from 5 to 15 years prior to the judgment of the District Court.

That appellant is entitled to interest at the legal rate of 6% per annum on the money diverted seems obvious. Authorities on this proposition are cited in paragraph 11 of our Summary of the Argument.

D.

Assignment of Error No. V

This assignment, like assignment No. 1, deals with the failure of the Court to allow numerous items involved in the accounting. What has been said above with reference to assignment No. 1 applies to assignment No. V, which reads as follows:

> "That the Court erred in holding and deciding that plaintiffs were entitled to judgment against defendant Boise City only for the sum of $6,-846.17 * * *" (R. 99).

E.

When an Improvement District or the Fund for the Payment of the Bonds Is Insolvent, Prorata Payment Must Be Made to All Bondholders.

Assignments of Error Nos. II, III, and IV (R. 98-99) all relate to the same error which is fully stated in assignment No. II, as follows:

> "That the Court erred in not holding and deciding that the defendant, Boise City, had failed to comply with the provisions of Section 49-2725, Idaho Code Annotated 1932, which provides in substance and effect that all bonds of Local Sidewalk and Curb Improvement District No. 38 of Boise City were equal liens upon the property for the assessments represented by such bonds, without priority of one over another, and in not holding that all collections made under such assessments should have been paid and applied pro rata on all bonds issued, to-wit: $56,539.10, and in not holding that said Boise City and its officers had wrongfully and in violation of law, redeemed and paid at par $19,539.10 of said bonds, with interest to date of redemption."

Sec. 49-2725, Idaho Code Annotated, provides in the last paragraph thereof that "and such bonds shall be *equal liens* upon the property for the assessments represented by such bonds *without priority of one over another* to the extent of the several assessments against the several lots and parcels of land" (our italics).

In Meyers vs. Idaho Falls, 52 Idaho 81, 11 Pac. (2d) 626, the Court considered the above section and the provisions of Sec. 49-2723, which provides in substance that bonds shall be paid in their numerical order. In that case the bonds had all matured, but that did not change the lien of the bondholders and their rights under Sec. 49-2725. The Court held that Sec. 49-2723 was not mandatory but directory only. It said:

> "Under the acts which we are considering, the bonds are all issued on the same date and they mature on the same date. The equality clause would under such circumstances apply in the absence of an express prohibition, and being expressly enacted in the same act, it would be a broad assumption to say that by mere numbering this claim is rendered entirely nugatory.
>
> "Both the equality clause and the numerical priority clause will be given effect by holding that the latter is directory only. We believe that the legislature only intended by the numerical priority clause to provide an orderly method of retiring the bonds, and for the stoppage of interest, and that it did not thereby intend to destroy the equal, joint estate of all of the bondholders in the lien of the bonds" (pp. 95-96).

That decision is in harmony with the general equity rule that "Equality is equity." The general rule on the subject is well stated in 1 Jones on Bonds and Bond Securities, Sec. 511. The author distinguishes

clearly between securities payable from an *inexhaustible power of taxation,* under which the fund may be replenished to pay all bonds, and bonds payable under a taxing *power* which is *limited and exhaustible.* In the former case, it is said the payment of a claim in full would not constitute a preference and would not prejudice the rights of the other creditors because the fund may be replenished, but in the latter case the fund can not be replenished and the bondholders should therefore share pro rata in the security and in the fund.

Trustees under private bond issues instantly come to attention when any default occurs which may prevent the payment of all bonds and interest in full. The rule is well stated by the Supreme Court of Washington in Welch vs. Northern Bank & Trust Company, 170 Pac. 1029. It is there said:

> "* * * So long as no active duty is demanded of the trustee, the trust is no more than nominal, but if by the terms of the trust deed the trustee engages to do something (hold property) for the benefit of those who buy bonds, the trust is from its inception an active trust as distinguished from a dry or passive trust.
>
> "'When trustees have accepted the office, they ought to bear in mind that the law knows no such person as a passive trustee, and that they can not sleep upon their trust. The trustee should make himself acquainted with the nature and circumstances of the property; for, though he is not responsible for anything that happens before his

acceptance of the trust, yet if a loss occurs from any want of attention, he may be held responsible for not taking such action as was called for.' Perry on Trusts and Trustees, Sec. 266."

Under the Idaho statute (Sec. 49-2725) every bond issued was an *equal* lien, not only on the funds in the hands of the treasurer but "upon the property for the assessments represented by such bonds * * * to the extent of the several assessments against the several lots and parcels of land."

One hundred thirteen bonds were issued—112 of the par value of $500 each and one of the par value of $539.10. The assessments were for the equal benefit of all bonds. This was not a case of 113 separate liens with the last-numbered bond holding the 113th lien, but here the last-numbered bond was of equal rank with the first-numbered bond. The matter of rank is unimportant when the fund is ample to pay all bonds, but whenever it appears, as it did in the case at bar, that the fund was insolvent from the beginning, the city violated its obligation and duties as trustee by paying and continuing to pay the bonds in numerical order without regard to the fact that there would be no money with which to pay the bonds carrying the higher numbers.

We have heretofore referred to the fact that the amount of the levy made for payment of principal was $45.48 less than the total aggregate principal of the bonds outstanding (R. 57). That loss can not

legally be placed upon bond No. 113—where it would be placed if the city's order of payment be approved.

We have heretofore also referred to Exhibit A (R. 94) as showing that the delinquencies in collection of taxes varied from about 50% to 80% per year during the entire period. The instant there was any delinquency it was obvious that the accumulation of interest would exceed the fund provided for the payment thereof, as the bonds could not then be retired as promptly as contemplated by the adopted schedule.

It was clearly apparent to all who were in touch with the payment of taxes that the fund was insolvent and insufficient to pay all bonds in full with accrued interest. When that appeared the city was violating its obligations to the bondholders by continuing to pay certain bonds in full. That course would throw the entire loss upon the bondholders who held the higher-numbered bonds, and deprive them of their rights under the statute.

Cases from both the state and federal courts are cited in support of this proposition under paragraphs 8 and 9 of our "Summary of the Argument." Many of these decisions were made in the absence of any statute specifically providing that the bonds were equal liens on the assessments against the several pieces and parcels of land, and without priority of one over another.

In the case at bar, the power of a city to levy assessments for the payment of the bonds was limited and "exhaustible." There was no provisions in the statutes whereby the fund could be replenished by reassessments or additional levies. Each of the 113 bonds

had a 1/113th share or interest in every assessment made for principal and for interest, and in every dollar collected for the trust fund.

The city was without power to waive or sacrifice the bondholders' rights. It could pay bonds in numerical order only if the trust fund would be ample to pay all bonds in full.

In the state of Missouri, drainage districts organized prior to the late depression had limited taxing power. Assessments for the payment of bonds were apportioned according to benefits, as in the case of improvement districts. Delinquency in the payment of taxes created a situation similar to that in the case at bar. The Supreme Court of that state, in State vs. Little River Drainage District, 334 Mo. 753, 68 S.W. (2d) 671, 674, after calling attention to the fact that there was no inexhaustible fund for the payment of the bonds, and while the law contemplated that the bonds and coupons should be paid as they matured out of moneys as collected, the Court held that when it appeared that the delinquencies were such as to create an insolvency in the fund, the treasurer of the district would not be permitted to pay bonds in full but would be required to make payment pro rata on all bonds. Among other things the court said:

> "* * * The bonds are payable solely out of special taxes levied against benefit assessments initially charged on the various tracts of land in the district, and as to each tract the tax can not exceed the benefit assessments standing thereagainst. If the tax returns within these limits

are and will be insufficient to pay all bonds and interest in full, the district is in legal effect insolvent.

"Second, though the limitations imposed by the article on the taxing power of the district are such as may reduce it to a state of insolvency, nevertheless the statute makes no provision for preference of priority between bonds or bondholders, but, on the contrary, pledges the taxes collected to the payment of *all* the bonds sold, with interest."

Again the Court said:

"Considering together the three groups of provisions reviewed in the preceding paragraphs, we are clearly of the opinion that performance of the requirements of section 10788 (Mo. St. Ann., §10788, p. 3515) with reference to the payment in full of bonds and coupons as they mature is contingent on whether the drainage district is solvent—or, in other words, *on whether there are and will be, so far as appears,* sufficient tax revenues to pay all bonds and coupons in full. The section *assumes* the solvency of the district and on that basis provides for disbursements from time to time out of the bond fund to pay matured bonds and interest; and the fund is replenished by successive subsequent tax installments paid in. To that extent matured and next maturing bonds and interest have a prior claim on the fund at any given time. But that does not mean the

fund is not held in trust for the benefit of all the bonds. The matured bonds are entitled to be paid in full *because* those of later maturity in their turn will be. * * *

"The very reasons which require the payment in full of bonds and coupons of the drainage district as they come due, so long as the district is solvent, would require that they be paid only ratably if the district becomes insolvent. By no other means can all the provisions of the article be harmonized and the parity of claim of all the bonds enforced" (our italics).

Again, in State vs. Duncan, 334 Mo. 733, 68 S.W. (2d) 679, 683, the same Court, dealing with the Missouri drainage acts, said:

"There is no more reason for saying one matured bond should be preferred over others in its class and be paid in full when the fund is insufficient to pay all, *than there is for contending it should be paid in full when the district is insolvent.* True, if the district is not insolvent, this trust fund can be replenished; but that does not justify a diversion of the fund to the full payment of particular matured bonds when other bonds having an equal claim thereon are thereby forced further to abide future collections and eventualities.

"* * * All matured bonds should share *ratably* in the fund as it stands and *likewise in replenishments thereof.* In that way all will be paid in full without discrimination or chance of

miscarriage, receiving interest to the date of payment if the bonds so provide.

"The statute gives them no rights beyond that. It contemplates, of course, that all bonds, and therefore each particular bond, shall be paid in full, but above that it requires equality." (Our italics.)

To the same effect are the recent decisions in Norfolk & W. Ry. Co. vs. Board of Education, 14 F. Supp. 475, and Board of Education vs. Norfolk and W. Ry. Co. (C.C.A. 7), 88 Fed. 462.

If the rule contended for be applied to the case at bar, appellants would be entitled to about 46⅔% of the face value of their bonds instead of 18½%. Converted into money, it would amount to $10,240 more than what appellants were allowed by the District Court. If the city paid to certain bondholders more than they were entitled to under the law, then it is liable for the difference between the amount they were paid and the amount they should have been paid, and appellants' judgment should be increased by the amount stated above.

It may be urged that the bondholders should have stood watch over the treasurer's office and promptly enjoined him from overpaying any bondholder. We submit that such argument is without merit. A trustee can not escape the consequences of his wrongful acts by the mere contention that the beneficiaries should have enjoined him from doing what he had no right to do, and that failing to do so, they can not complain

after he has dissipated the assets or funds of his trust.

The bondholders in the case at bar, as usual, were widely scattered throughout the Union. Some owned but one or two bonds, some more, and the law does not cast upon each one of them the burden of standing watch over the trust fund and to see that the statutory trustee performs duties imposed on it by law. On that theory bonds could never be sold or money borrowed for public improvements or municipal purposes.

IV

Right of Bondholders to Foreclose the Lien Against the Several Pieces and Parcels of Land Is an Impracticable Remedy and Optional with the Bondholders.

Section 49-2709 provides for the city foreclosing the lien of assessments, and Section 49-2725 provides that: "if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, * * *."

The right of a bondholder to bring suit to foreclose such lien is clearly optional. Where all the bonds are held by one party, as is often the case where a contractor takes the bonds in payment for the improvements, that remedy may be practicable, but where several hundred bonds are sold to bondholders scattered throughout the country, the privilege extended by the statute is wholly impracticable.

Under the statute every bond is a lien against each tract of land, and the holder of one bond out of 113 could only collect 1/113th part of the assessment on any one tract.

If the bonds should be held to be liens according to their numerical order, then the foreclosing bondholder would presumably have to make the other bondholders parties defendant to the suit. The expense of title examination, the expense of bringing suit and determining the necessary parties and pro rating the fund collected, are insurmountable obstacles to the remedy of foreclosure by individual and widely scattered bondholders. Clearly no bondholder would be permitted to collect, in any event, more than his pro rata share of the assessment; he would have no authority to pro rate the funds among the other bondholders or act as their agent or representative. Both the city as trustee for all bondholders and the lot owner would presumably object to the money being paid to any one except the city treasurer, so that it could be disbursed according to law upon surrender of the bonds and coupons.

We submit, therefore, that appellants were not required to exercise the right of foreclosure, and that the city can not escape liability for its wrongful acts on the plea that the bondholders should have enjoined it from violating the law, or that, when the city failed to do its duty, the bondholders should have foreclosed their liens and by such procedure protected themselves against the losses that would otherwise result from the negligent and wrongful acts of the city and its officers.

In conclusion, the entire record is now before this Honorable Court. In its last report or account appellees said (R. 93):

> "With the matters furnished herein, Boise City has furnished all of the facts pertaining to said Local Sidewalk and Curb Improvement District No. 38, that it is possible for it to furnish."

It would seem, therefore, that there can be no occasion for remanding the cause back to the District Court for further hearing, and we accordingly submit that this Court should direct the judgment to be entered, based upon the facts before it.

Respectfully submitted,

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October 19, 1938.

APPENDIX

Statutes of Idaho Deemed Pertinent to the Issues Involved

(Sections are of Idaho Code Annotated, 1932)

From Chapter 1, Title 49, relating to cities of the first class:

SEC. 49-156. *Finances—Collection of special assessments—Duty of city clerk.*—The city clerk of such city shall collect special assessments levied therein of whatsoever kind or nature, and shall give public notice in at least three consecutive issues of the official paper of said city, ten days before said assessments become due, which notice shall state the time for payment to begin and the time for payment to close, and that ten per cent penalty will be added after delinquency; and shall also mail a postal card to each property owner containing the substance of said notice; and any property owner may redeem his property from said assessment by paying the principal thereof with accrued interest within the time specified in said notice, and in default of such payment the same shall become delinquent and a penalty of ten per cent shall be added.

SEC. 49-157. *Collection of special assessments—Certification of delinquencies to tax collector.*—All such delinquent assessments, together with the penalty, shall be certified to the tax collector of the county by the city clerk and placed upon the tax roll and collected in the same manner and subject to the same penalties as other city taxes: provided, that the provisions of this and the next

preceding section shall apply to all special assessments levied in any city to which the provisions of this chapter are made applicable, or which shall be organized under this chapter, whether such special assessment was levied prior to or after the passage of this chapter, or the organization of any city hereunder.

From Chapter 27, Title 49, relating to local improvement districts organized prior to March 15, 1927:

SEC. 49-2702. *Bases of assessments.*—The assessment of the cost and expense or any work or improvement * * * shall be assessed upon the abutting, contiguous and tributary lots and lands, and lots and lands included in the improvement district formed, each lot and parcel of land being separately assessed for the full debt thereof in proportion to the number of feet of such lands and lots * * * and in proportion to the benefits derived to such property by said improvement sufficient to cover the total cost and expense of the work to the center of the street.

SEC. 49-2709. *Lien of assessment—Foreclosure.* —Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.

Such suit shall be in the name of the city of ..... (naming it) as plaintiff, and in any

such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this chapter, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land, notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers.

SEC. 49-2710. *Assessment roll.*—Upon the passage of an ordinance as herein provided * * * the committee on streets, together with the city engineer * * * shall make out an assessment roll according to the provisions of said ordinance and shall certify the same to the council or trustees of such municipality.

SEC. 49-2715. *Special assessments for improvements—Collection.*—All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes.

SEC. 49-2716. *Bonds—Issuance to cover instalment payments.*—Whenever the mayor and council or trustees of any municipality shall, under author-

ity vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be side-walked, graded, curbed, planked, graveled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed ten years from and after the date of issue of such bonds, and shall bear interest not exceeding seven per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees: * * *

SEC. 49-2719. *Annual tax levy for instalments and interest.*—When district bonds are issued under this chapter for improvements, the cost of which is by law charged by special assessment against specific property, the mayor and council,

or trustees, or other authorized officer, board or body, shall levy special assessments each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included. Such assessment shall be made upon the property chargeable for the cost of such improvements, respectively, and shall be levied and collected in the same manner as may be provided by law for the levy and collection of special assessments for such improvements where no bonds are issued, except as otherwise provided by this section. But the basis of such assessment, whether upon such assessed valuation, frontage, or otherwise liable for such costs, shall be retained for the assessment of succeeding instalments of said bonds.

SEC. 49-2723. *Payment of bonds—Duties of treasurer.*—The funds arising by such assessments shall be applied solely toward the redemption of said bonds.

The city treasurer or other authorized officer of such municipality shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund against which bonds have been issued under the provisions of this chapter, over and

above the amount sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds, which shall be called and paid in their numerical order: provided, that such call shall be made by publication in the city official newspaper on the day following the delinquency of any instalment of the assessment or as soon thereafter as practicable and shall state that bonds No. ——— (giving the serial number or numbers of the bonds called) will be paid on the day the next interest coupons on said bonds shall become due, and interest upon said bonds shall cease upon such date.

SEC. 49-2725. *Bondholders' rights and remedies.* —Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this chapter in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

And if the municipality shall fail, neglect, or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with costs of such suit, including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land.

49-2728. *Municipality Not Liable.*

(This section is set out in bond attached to plaintiffs' complaint as Exhibit "A" [R. 28].)

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN and ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLEES' BRIEF

On Appeal from District Court of the United States for District of Idaho, Southern Division

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Residence: Boise, Idaho

STRAWN & CO. INC. STATIONERS-PRINTERS, BOISE

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STATUTES

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPELLEES' BRIEF

JURISDICTION

We agree with appellant's statement of jurisdiction of the District Court. This is a suit between non-residents of the State of Idaho, and a municipal corporation, and the officers of such municipal corporation within the State of Idaho, for more than $3000.00, brought in the District of Idaho.

APPELLEES' STATEMENT OF CASE

The Appellants filed suit against Boise City, a municipal corporation, and Thomas F. Rodgers, as City Treasurer of Boise City, to recover for themselves and

others similarly situated for the face value of certain bonds held by appellants and issued by Boise City for improvements in Local Sidewalk and Curb Improvement District No. 38. The complaint of the appellants alleged among other things, the issuance of said bonds, the ownership thereof, and the presentation of the same to the City of Boise for payment and their refusal of such payment. (R. 11-16.) Appellants then allege the negligence and carelessness of Boise City in permitting its former City Clerk, who held the position of Clerk for upwards of 10 years prior to September, 1933, to embezzle large sums of money of the City which included, they allege, large sums of the funds of Local Sidewalk and Curb Improvement District No. 38 (R. 16-17). They further allege negligence of Boise City in permitting inaccurate and insufficient records and an inadequate system of accounting to protect the funds held in trust for the appellants and other bond holders, and because of such negligence generally alleged without specifically naming any detailed fact of negligence, various conclusions of negligence, and prayed for judgment against the City to make a full and true accounting of its statutory duties as trustee, and for payment to the appellants of the full amount of principal and interest of the bonds. (R. 22-25.)

The appellees answered and denied among other things, the amount of the embezzlement alleged by appellants, denied the negligence and carelessness and

wrongful acts of its officers, but admitted that the City Clerk did appropriate to her own use and embezzled large sums of money of Boise City, but denied that she embezzled any funds of Local Sidewalk and Curb Improvement District, No. 38, in excess of $2242.92. (R. 29-32.)

Appellees further denied that the condition of the fund of District No. 38 "can not be ascertained and determined without making a full, true and correct account of any of the accounts of the defendant" and alleged that at said time a full, true and correct account of all the books, records and accounts of this and other Improvement Districts was obtained by the City of Boise at a cost in excess of $30,000, and which disclosed all information desired by the account sought by appellants, and that said account and audit has since its completion, been open and available for use by appellants, their agents or attorneys, and that all the books and records pertaining to this accounting, and the Local Sidewalk and Curb Improvement District, No. 38, are open and available to the appellants, their agents or attorneys. (R. 34-36.) Appellants moved for an order to require an accounting by the appellees and the order was made. (R. 38.) This order was immediately complied with by appellees. (R. 79-83.) Another motion was made for a fuller and more complete account (R. 40) which, without order of the court, was complied with by appellees (R. 84-90). Another request for further particulars

was filed by appellants (R. 41) and all the details and information held by Boise City was submitted to counsel for appellants, and by him prepared. This was submitted as Exhibit "A" (R. 94) to the Second Supplemental Report (R. 90-94) all of which reports contained in detail all of the information and accounting asked for by appellants. Excerpts from the audit mentioned were introduced by appellants after the reports and accounts were entirely made by the appellees. (R. 67.) Thereupon counsel for appellants offered the audit report of Lybrand, Ross Brothers and Montgomery and certain excerpts therefrom were admitted. These excerpts have almost exclusively been generalities as to the manner of keeping the records and books of Boise City (R. 67-76) but do show the summary of special assessments unaccounted for in Sidewalk and Curb Improvement District No. 38 (R. 78). This amount was $3396.19.

The Court entered judgment in favor of Appellants for the sum of $6,846.17. This sum was made up of items as follows:

Difference between amount received and amount paid out	$3,404.50
Amount shown as unaccounted for (embezzled) by City Clerk	2,242.92
Assessments shown on books not certified to county	800.11
Amount marked paid on rolls but no receipts found and money not accounted for	353.16
TOTAL	6,846.17

SUMMARY OF THE ARGUMENT

1. The appellees contend that two methods of procedure are open to bondholders:

(1) By mandate to compel the City to collect the assessments of the bondholders.

(2) The City may be sued for the amount of the assessment made after its officers have collected the same.

Smith v. Boise City, 18 Fed. Supp. 385.

Cruzen v. Boise City, 58 Ida.—74 Pac. 2d 1037.

2. Statutory trusts are not normal trusts and the obligations of the trustee are limited by the restrictions of the statutes.

2 Bogart on Trusts, Sec. 245, p. 833.

Smith v. Boise City, 18 Fed. Supp. 385.

3. Plaintiffs must prove a prima facie case in a suit for an accounting, and the burden of proof is not on the accountant but on those who question the correctness of his accounts.

65 C. J. 906 and 937.

4. The remedy of the bond holders when the taxpayer fails to pay assessments is not against the city nor the improvement district, nor against a person who has paid his assessments, but against the property of the delinquent and the bond holder must pursue the remedy provided by the statute.

Sec. 49-2725, I. C. A.

New First National Bank v. City of Weiser, 30 Idaho 15, 166 Pac. 213.

6 McQuillan Municipal Corporation, page 128, Section 2428.

Richardson v. City of Casper (Wyo.), 45 Pac. 2d 1.

Broad v. Moscow, 15 Ida. 606, 99 Pac. 901.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, 65 A. L. R. 1372.

5. The bonds of Improvement Districts must be paid in numerical order before the maturity and when there is no objection made by the bond holders. And when so paid the City is not liable.

Sec. 49-2723 I. C. A.

Meyers v. City of Idaho Falls, 52 Idaho 81, 11 Pac. 2d, 623.

New First National Bank of Columbus (Oh.) v. Lindeman, 33 Ida. 704, 198 Pac. 159.

6. When the assessments for special improvements were made, for the life of the bond issue they could not be changed. When delinquencies occurred and more interest was required to pay the bonds because of the city's inability to retire them, no new interest could be added to the roll increasing the burden on taxpayers already paying the tax.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, 65 A. L. R. 1372.

New First National Bank v. Weiser, 30 Idaho 15, 166 Pac. 213.

7. Penalties charged on delinquencies do not belong to the bond holders. On collection of special assessments the bond holders are only entitled to "and shall recover in addition to the amount of special bonds and interest thereon, 5 per cent, together with costs of such suit including a reasonable sum for attorneys' fees."

Section 49-2725 I. C. A.

Canter v. Lincoln National Life Co. (Ind.), 8 NE 2nd 232.

8. The city is not liable for principal paid on interest.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227.

Moore v. Nampa, C. C. A., 18 Fed. 2d 860 ID; 276 U. S. 536, 48 S. C. 340; 72 L. Ed. 688.

Cagnon v. Butte, 75 Mont. 279, 243 Pac. 1085; 51 A. L. R. 966.

Capitol Heights v. Steiner, 211 Ala. 640, 101 So. 451; 38 A. L. R. 1264.

9. The laches of the bond holders bars any right of action against the city.

Brown-Crummer Investment Company v. City of Burbank, 17 Fed. Supp. 419.

Hammond v. City of Burbank (Calif.), 59 Pac. 2d 495.

Grey v. City of Santa Fe, 15 Fed. Supp. 1074.

Wheeler v. City of Blackfoot, 55 Idaho 599, 45 Pac. 2d 298.

New First National Bank v. Weiser, 30 Ida. 16, 166 Pac. 213.

Richardson v. Casper (Wyo.), 45 Pac. 2d 1.

Bogart on Trusts, Vol. 4, Sec. 964, p. 2791.

I.

ISSUES OF THE CASE

In the decision on the motion to dismiss the district court pointed out very clearly that there were two proceedings open to the bondholders under our statutes. The nature of these two proceedings distinguish these cases in Idaho from those of most other states, and stamp them with a difference as to the rule, both of the accountability of the City and its accountability as a statutory trustee throughout the entire case. As the court stated, in the first place if the city neglects to levy the assessments and pursue the usual and ordinary methods provided by the statute for the collection of the same, the holders of the bonds may compel it to do so by mandate or if it fails and neglects to collect the assessment after levy having been made and the property owners become delinquent in the payment of the installments, the bondholders may foreclose their lien through the court. The second remedy is that—

> "The city may be sued and is liable for the amount of the assessment made for the improvement for which bonds were issued *after* it had by its officers collected the same, for the statute seems clear

> that the city is 'liable for collection of the special assessments made'. The facts alleged do not bring the case under the first remedy, *for complaint is not made of failure of the city to act in levying the assessment and thereafter collecting the same, but it is brought under the second remedy to conserve and apply the assessment already collected by the city through its officer to the payment of the bonds as it alleges that the assessments were made and collected by the officer of the city and by her misappropriated.*" (Emphasis ours.)
>
> Smith v. Boise City, 18 Fed. Supp. 385.

That the court, then, throughout the entire case, treats the question exclusively as one for an accounting of moneys had and received in trust for the bondholders and in no instance as a case having anything to do whatsoever with a failure to comply with any other statutory duty.

In the appellants' brief it appears that they have not been content to stay within these bounds as alleged by their complaint as observed by the court, but further contend that in addition to the liability for embezzlement that the rule of the court applies to the city to require full responsibility of the city to provide the loss sustained by reason of the failure of taxpayers to pay their assessments. All of these liabilities claimed are outside the facts of the issues of this case as pointed out by the court, except such sums as have been shown to have been actually received by Boise City.

The defense of the appellees was set up based upon this theory. But the appellants, contrary to the principle thus announced, endeavor by ingenious argument, by evasion of the burden of proof to make a prima facie case, as will be hereafter pointed out, by endeavoring to divert the court's attention from their own laxity, negligence and laches in failing to protect their own interest as was their duty, to hold the city and its taxpayers *generally* liable and reach a purse more solvent than the improvement district upon which the security was based, and recover on their bonds for matters, which, under the court's ruling could not be and were not raised as issues of this case.

II.

ACCOUNTING MADE BY CITY

Appellants attempt to make it appear that the city's accounting is incomplete, partial and fragmentary, but such is not the case as the record shows. On or about September 8, 1937, motion was filed by appellants asking that an order be made requiring defendants to make a full and true accounting of their acts showing

(a) Assessments levied
(b) The collection made
(c) The amount paid out for principal and interest
(d) Amount of assessments, penalties and interest cancelled or rebated
(e) Amount certified to Ada County for collections

(f) The amount received from Ada County

(g) The amount embezzled or otherwise wrongfully appropriated, the allocation of the amount recovered on the bond of the City Clerk

(h) The allocation of the $14,500.00 collected by Boise City on the bonds of the City Clerk (R. 37).

On October 2nd, an order was made requiring the defendants to make such showing. Pursuant thereto the defendants made their report and account. This showed exactly what the plaintiffs asked for and what the court ordered, to-wit:

(a)	Assessments levied	$56,493.62
	Interest levied	21,750.25
(b)	Collections made	
	City Clerk	31,060.27
	From Ada County	23,816.24
(c)	Amount paid out for principal and interest	
	As principal	19,539.10
	As interest	31,932.88

(d) That the records show no rebate or cancellations of assessments, penalties or interest.

(e) Amount certified to Ada County. This shows 10 installment certifications although the date isn't attached. It is later shown by the second

supplemental account to have begun in 1922 and totals..... 49,470.93

(f) Amount received from Ada County from each such certification, totals.... 21,672.40
With subsequent items paid each year to 1937 making a grand total from Ada County of..... 23,816.24

(g) Refers to the only information available charged to the Angela Hopper embezzlement, the sum of.. 2,242.92
and two other items showed as
(1) unpaid and overdue and not certified to Ada County..... 800.11
(2) Marked paid on rolls in excess of amount of duplicate receipts 353.16

(h) That the $14,500 were being held in a special suspension fund to be kept and maintained for judicial determination of the owners thereof. (R. 79-83.)

Thereafter at the request of the appellants without an order of the court the appellees furnished a supplemental report and account containing excerpts from the audit report of Lybrand, Ross Bros. and Montgomery and of the records of Ada County as far as said Boise City has been able to go in obtaining said records. (R. 84-90.) No attempt was made to

fully audit the records of Ada County pertaining to delinquencies in this improvement district because such records are open to the bondholders in their own interest and because Boise City, in its own right, had no power or authority to require an accounting of these funds from Ada County. (See: Haydn v. Douglas County, 170 Fed. 24.) The records in the supplemental account show simply the condition of the delinquent improvement district assessments against the particular property from the years 1928 to 1931, inclusive, and the disposition of said property during that time. (The details of these are all omitted in the statement of evidence on appeal.) This indicates that there remains unsold on the records of Ada County lands on which delinquencies in the sum of $195.16 for those four years, which, under the authorities, the appellants have the exclusive right to pursue in their own behalf for foreclosure of all the liens against this property.

On the day this case was set for trial the plaintiffs filed what they termed OBJECTIONS TO REPORT AND REQUEST FOR FURTHER PARTICULARS (R. 41), such objection to the supplemental report was only that it was incomplete. Prior to this time, all the records in possession of Boise City, and the accounts of improvement district No. 38, were submitted to counsel for plaintiffs including this Lybrand, Ross Bros. and Montgomery audit with the request that he prepare from this material all the mat-

ter that he desired to be presented in this case, informing him that we were submitting all of the information we had, in a report and account in order that the court might have before it the full and complete details of the condition of the funds. Counsel for plaintiffs thereupon prepared Exhibit "A" to Second Supplemental Account (R. 95), which was submitted by the defendants as their second supplemental report and account in identically the same form as prepared by counsel for the appellant, with the exception of certain minor corrections. When appellants rested there had been no proof submitted of the payment of any bonds by the City, nor the collection of any of the funds by the City and at that time all of such accounts having been filed for record in this case, defendants offered as evidence, and as exhibits 1, 2 and 3, respectively, the report and account (R. 79), the supplemental report and account (R. 84), and the second supplemental report and account (R. 90), as truly showing the contents of the records of Boise City with reference to Improvement District No. 38, and these were admitted without objection.

In this second supplemental report, a showing is made that it is impossible to determine the tax sales and conveyances to and from Ada County, prior to the year 1928 and subsequent to the year 1931. That such information is not contained upon the records of Boise City, but is a part of the records of Ada County, and that with this statement the City of Boise has fur-

nished all the facts pertaining to Improvement District No. 38 that it is possible for it to furnish.

Since the presumption prevails in favor of the trustee's honest exercise of his discretion and since the burden of proof is not on the accountant or the trustee but upon those who question the correctness of his accounts as set out in the text, 65 C. J. 937, and since in all of these accounts, they in detail show completely all amounts levied for the payment of said bonds, the amounts collected and the amounts delinquent, and that since no objection or other evidence has been introduced by the plaintiffs to contradict this or to question its legality, how can anyone be heard to say that defendants have not made a full and complete account?

Under the first account two items are set up of amounts provided for payment of principal of the bonds. The assessment levied was $56,493.62. The ledger account at the City Clerk's office shows $56,639.16, the latter amount being the exact amount of the principal of the bonds. Appellants contend that for this difference of $45.48, the appellees are liable, but let us examine the accounts to determine this. It is true that the original assessment roll was for $56,493.62, but the record also shows the following:

Received by the City Clerk	$31,060.27
Certified to the County	49,470.93
Total	$80,531.20

The amount of interest levied which was fully sufficient to pay all interest accounts on the bonds had the assessments been paid promptly was $21,750.25, or a total of $78,243.87, providing for principal and interest. This left a balance to apply on either interest or principal, which was actually levied, of $2,387.33, concededly considerably more than enough to take up the $45.48. The $14,500 recovered by the City on the Clerk's bonds were recovered on the general bonds, and had nothing to do with the special improvement district funds whatsoever. No action was taken by the District Court concerning this money, and no error is claimed by appellant.

III.

STATUTORY TRUSTS ARE NOT NORMAL TRUSTS

Considerable comment has been made concerning the various accounts that have been made by the appellees. We desire to call the court's attention to the fact that in the first place all of the records of Boise City are public records to which the appellants have had, since the time they purchased their bonds, full and complete access. In our answer (R. 34) we particularly set out and alleged the audit of Boise City by Lybrand, Ross Bros. and Montgomery, from which excerpts were admitted in evidence as presented by the appellant (R. 65-79), and in our answer further we stated "that said account and audit is now and at all

times since the completion thereof, and long time prior to the commencement of this action, has been open and available for use by plaintiffs, their agents, servants or attorneys, and that all the books, records and accounts in connection with Local Sidewalk and Curb Improvement District No. 38 in possession and custody of the appellees are now open and available for inspection by appellants, their agents, servants or attorneys." (R. 35.)

At 65 C. J., page 883, it is stated:

> "Where the trustee has at all times kept his records open for inspection and has furnished his accounts to a beneficiary for examination and inspection, fully and freely affording every opportunity for information, a beneficiary receiving such full disclosures and opportunity to investigate has no right to vex and harrass the trustee by demanding an accounting."

We submit to the court that where a public body is designated a statutory trustee and the rights and liabilities of the trustee are prescribed by the statute it is then that the general rules regarding trustees do not apply but are limited by the provisions of the laws creating this trusteeship, and because of the fact that this relationship is not only created by statute but that the rights of the parties are specifically defined, these statutes must be considered to determine the obligations which this trustee owes to its cestui que trust.

In volume 2 of Bogart on Trusts, Sec. 245, page 833, it is said:

> "Some of the American statutes referred to above not merely create or provide for the creation of trusts, but also give some details as to the method of execution of the funds, accountings and termination. To this extent these statutory trusts are not normal trusts, and the general principles herein do not apply to them."

(See also court's opinion, R. 47.)

The question of whether under the statutes of the State of Idaho a city may become liable generally in in tort action because of negligence of the officers of the city, in performing their duties under the improvement district code, is no longer open to question. In Broad v. City of Moscow, 15 Idaho 606, 99 Pac. 101, decided 28 years ago, it was held that those provisions of the statute which we have referred to above and which carefully eliminate any claim against the city in connection with the debt created by the bonds and which further provide two distinct remedies to the bondholders in case of neglect or refusal of the city officials to perform their duties, renders the city immune from a general judgment based upon a tort action. In affirming the judgment the Supreme Court reviewed the authorities at length and followed the doctrine announced in those cases holding the city not liable for the negligence of its officers. After quoting at length from City of Pontiac vs. Talbot Paving Com-

pany, 94 Fed. 65, and German-American Savings Bank v. City of Spokane, Washington, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259, the court said:

> "If the plaintiff could maintain this action for damages, because the officers of the defendant failed to do their duty, then an indebtedness might be created against the city, which the statute says must be raised by special assessments, only, against the property benefitted. In other words, if this suit can be maintained, then the plaintiff has done indirectly what the statute says cannot be done directly, and the mere fact that the officers have failed to do their duty and the plaintiff has taken no steps to compel them to do that which they have agreed to do, and which they are authorized to do under the statute, will not give him the further remedy of subjecting the city to damages by reason of the fact that they have not performed their duty. * * * "

> "If a general judgment could be obtained against the city, then to the extent of such judgment there would be an increased debt above the expense of the improvement which the property must pay. We think it clearly appears from the entire act that the legislature intended to inhibit the creation of any municipal indebtedness and to limit all claims for such improvement to the property affected. From this discussion it follows that the failure of the city to pay the contract price,

> either in cash or bonds, would not subject the city to damages, but the contractor or bondholder would be relegated to the remedy clearly indicated by the statute of an action to compel the officers of such city or village to perform such duty, as the act requires. We are therefore of the opinion that the judgment of the trial court was right."

IV.

PLAINTIFF MUST PROVE PRIMA FACIE CASE

An examination of the statutes will show the duties which rest upon the trustee. In the first place, however, it is elementary that to have a standing in court at all the cestui must show some interest in the trust. In 65 C. J., page 906, it is said:

> "In an action for an accounting against a trustee, plaintiff has the burden of proving the existence of a trust, and ordinarily the receipt by the trustee of some property impressed with the trust, and, under some circumstances, the amount of the property so received."

It was not shown by the plaintiffs in any stage of the proceeding that the appellees-trustees had received any property impressed with the trust, nor the amount thereof. From the very beginning of this case, appellants have proceeded upon the erroneous idea that they had no burden of proof, that the mere unsupported

allegations of their complaint were sufficient to shift the burden of proof to the appellee. We apprehend, however, that the above mentioned requisite on the part of the plaintiff, that the interest of a pretended cestui que trust in a trust estate must be proved by the cestui before even a prima facie showing is made, and many of the cases go so far as to require the showing by the cestui that actual funds have been received by the municipality before a cause of action is stated.

In 65 C. J., page 937, it is stated:

> "In proceedings for stating and settling the accounts of trustees, all proper presumptions will be indulged, and every presumption is in favor of the trustee's honest exercise of his discretion. On this question the burden of proof is not on the accountant, but on those who question the correctness of his accounts."

At the top of page 33 of appellants' brief, a quotation is made from Bogart on Trusts, Section 963, and an omission indicated at the end of the first paragraph. We desire to quote that omission which appellant evidently intentionally omitted:

> "*It lies within the discretion of the Court if there is no relevant statute,* to order an account of the trustee or his successor in interest, at the suit of any interested party, at such time as seems reasonable to the court in view of the time which

has elapsed since the last account and the *nature and status of the particular trust.*" (Italics ours.)

Referring to the statutes hereafter mentioned, the complaint only states facts charging the appellees with responsibility for moneys actually collected, and since the decision of the State Supreme Court in the case of Cruzen v. Boise City, Idaho, 74 Pac. 2d, 1037, this seems to be the settled rule of the law in this State. That case, however, involved exclusively a question of liability of the City for funds collected by it and embezzled by the City Clerk, and had absolutely nothing to do with the liability of the City for any other reason, falling squarely in line with the decision of the District Court in this case.

V.

THE STATUTES WHICH DEFINE AND LIMIT THE TRUST

According to the evidence admitted in this case through the introduction of the bond attached to the petition, and the allegations of paragraph IV of the petition, the improvement district was created pursuant to the provisions of Article 3 and Article 6 of Chapter 163 of the Idaho Compiled Statutes in 1919. Since no complaint was made of the failure to levy sufficient assessments in said complaint no evidence was introduced by either party with respect thereto, nor were the ordinances creating the improvement district

ever introduced or presented to the court for the reason that no question thereon was raised. Referring, therefore, to the procedural part of the statute contained in Article 6 of Chapter 163, which now appears as Chapter 27 of Title 49 of the Idaho Code Annotated. It will be observed that Section 49-2715, Idaho Code Annotated, which was Section 4013 C. S., provides the method of collection thereof. Section 49-2716 I. C. A., the same as Sec. 4014 C. S., provides for the issuance of bonds to cover the expenses of the improvement instead of levying the entire tax at one time. Section 49-2718 I. C. A., the same as 4016 C. S., prescribes the limitations of the bond issue. That following Section 49-2719 I. C. A., the same as 4017 C. S., provides as follows:

> "ANNUAL TAX LEVY FOR INSTALLMENTS AND INTEREST.—When district bonds are issued under this chapter for improvements, the cost of which is by law charged by special assessment against specific property, the mayor and council, or trustees, or other authorized officer, board or body, shall levy special assessments each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included. Such assessments shall be made upon the prop-

erty chargeable for the cost of such improvements, respectively, and shall be levied and collected in the same manner as may be provided by law for the levy and collection of special assessments for such improvements where no bonds are issued, except as otherwise provided by this section. But the basis of such assessment, whether upon such assessed valuation, frontage, or otherwise liable for such costs, shall be retained for the assessment of suceeding instalments of said bonds."

Section 49-2720 I. C. A., or C. S. 4018, prescribes the form of bonds. Section 49-2721 I. C. A., which is the same as C. S. 4019, provides as follows:

"PAYMENT OF INSTALMENTS BY OWNER.—The owner of any piece of property liable for any special assessments may redeem his property from such liability by paying the entire assessment chargeable against his property, upon the municipal clerk having published a printed notice in the official newspaper of the municipality for ten consecutive days, or three weekly issues, which notice shall state the time for payment to begin and the time for payment to close, the last day of said notice to be not less than thirty days before the issuance of the bonds, or, after the issuance of the bonds, by paying all the instalments of the assessments which have been levied and also the amount of the unlevied instalments with interest on the latter at the rate pro-

vided in the bonds from the date of the issuance of the bonds to the time of the maturity of the last instalment. In all cases where instalments of the assessments are not yet levied and paid as above provided, whether before or after the issuance of the bonds, the same shall be paid to the clerk, who shall receipt therefor, and all sums so paid shall be applied solely to the payment of the cost and expenses of such improvements or the redemption of the bonds issued therefor.

"When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further special assessments for the cost of such improvements except as hereinafter provided."

Section 49-2713 I. C. A., which is the same as 4021 C. S., provides as follows:

"PAYMENT OF BONDS * * DUTIES OF TREASURER. — The funds arising by such assessment shall be applied solely toward the redemption of said bonds.

"The city treasurer or other authorized officer of such municipality shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund

against which bonds have been issued under the provisions of this chapter, *over and above the amount sufficient for the payment of interest on all unpaid bonds to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds,* which shall be called and paid in their numerical order: provided, that such call shall be made by publication in the city official newspaper on the day following the delinquency of any instalment of the assessment or as soon thereafter as practicable and shall state that bonds No..... (giving the serial number or numbers of the bonds called) will be paid on the day the next interest coupons on said bonds shall become due, and interest upon said bonds shall cease upon such date." (Italics ours.)

Section 49-2725 I. C. A., which is the same as Sec. 4023 C. S., provides as follows:

"BONDHOLDERS' RIGHTS AND REMEDIES. — *Said bonds,* when issued to the contractor constructing the improvements in payment thereof, or *when sold as above provided, shall transfer to the* contractor, or other owner or *holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this chapter in regard to the redemption of their property*

as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

"And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with costs of such suit including a reasonable sum for attorney's fees.

"Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

"And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land." (Italics ours.)

It is our contention that this statute bars the appellants from recovering against the City personally, the

amount which it has not collected, but requires the bondholders to take action in their own names, to protect their own interest by proceeding against the property.

In volume 6, McQuillan, page 128, Section 2428, it is said:

> "Mandamus or mandatory injunction to compel the collection and payment over of the special assessment, except that in the federal courts mandamus does not lie as an original proceeding. However, the holder of improvement bonds cannot bring mandamus against the municipality to compel the payment of the bonds where there is an adequate remedy at law."

In the case of New First National Bank v. City of Weiser, 30 Idaho 16, 166 Pac. 213, in construing the same act, the court said:

> "The remedy of the bond holder in case a property owner fails to make payment of the taxes assessed against his property, is not against the city nor the improvement district, nor against a person who has paid the sum due from him, but against the property of the delinquent. Under said act the plaintiffs have a plain, speedy and adequate remedy at law for the collection of any interest or principal due from any property owner who has failed to pay the assessments made by the City authorities and that being true a writ of

mandate will not issue. The bondholder must pursue the remedy provided by statute."

When these bonds were issued that holding was the declared law of the state, of which the appellants were charged with notice. Thus there appears another limitation on the trustee responsibility to the bondholders and this limit is specifically based upon the *failure, neglect* or *refusal* of *the city* to pay the bonds, thus based upon a tortious action of a municipality in its collection, a failure which is usually covered by general rules of law in accountings of trusteeships. Our legislature has therefore defined the policy and the limits of relationship of the parties.

In Richardson v. City of Casper (Wyo.), 45 Pac. 2d, 1, on the question of liability of the city for failure, refusal or neglect to collect the assessments, the court cited with approval the case of New First National Bank v. Weiser, (supra), and comments on the similarity of our statutes, then says:

> "It was held in the case last cited that the statute giving the right to bondholders to enforce assessments themselves gives them a plain, speedy and adequate remedy, which is exclusive, and no recourse against the city is available. In Broad v. City of Moscow, 15 Ida. 606, 99 Pac. 101; Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, 51 A. L. R. 966; and Moroney v. Surety Co., 168 Okla. 69, 31 Pac. 2d 926, it was held that the City could not be held liable for failure to

collect or for negligence in collecting assessments. * * * In the case at bar there is not only a contractual limitation of, but also a statutory one. In such case no duty of diligence can be implied, at least in so far as the legislature has given a direct means of relief on the part of the bondholders, and at least in so far as liability for tort is concerned. *Cases involving merely contractual limitation of liability stand on a different footing from those in which an act of the legislature must be considered.* In the former, no public policy of non-liability is involved. In the latter there is. In this state, the legislature has spoken unequivocally and emphatically. Plaintiff is charged with knowledge thereof. We cannot give him any relief herein without holding that the legislature has no right to establish a public policy to the contrary. We do not see how we can do that." (Emphasis ours.)

Section 49-2728, I. C. A., which was C. S. Sec. 4026, is the statute which purports to limit the liability of the municipality except for the collection made. This statute provides:

"The holder of any bond issued under the authority of the Article shall have no claim therefor against the municipality by which the same is issued in any event, *except for the collection of the special assessment made* for the improvement for which said bond was issued, but his remedy in

case of non-payment shall be *confined* to the enforcement of such assessments." (Emphasis ours.)

VI.

BONDS ARE PAYABLE IN NUMERICAL ORDER BEFORE MATURITY

Appellees contend that the fund created by statute for the payment of the improvement bonds should have been pro-rated from the very first and that if the City pays bonds in their numerical order prior to the maturity of the bonds, it is liable for the deficiencies after maturity when the fund is insufficient to pay the principal and interest of the outstanding bonds. We have pointed out above, the statute, to-wit: 49-2723, I. C. A., which provides that the City Treasurer, or other authorized officer,

> "shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund against which bonds have been issued under the provisions of this chapter over and above the amount sufficient for the payment of interest on all unpaid *bonds to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds, which shall be called and paid in their numerical order.*"

This question was the subject of litigation in the case of Meyers vs. City of Idaho Falls, 52 Ida. 81, 11 Pac. 2d 626. In this case the court was called upon to determine whether or not the bonds, *after their maturity date,* should share pro-rata in the deficiency amounts on hand or whether at that time they should be paid in their numerical order. The question was not raised in that case nor in any case cited by appellant as to any City liability for having paid bonds in accordance with the statute prior to maturity, but the court construed the statutes particularly the last paragraph of Section 49-2725 I. C. A., the same as C. S. 4023, which provides for equal liens upon the property by the bondholders. In the Meyers case, with respect to payment before maturity, it is said:

> "We believe that the legislature only intended by the numerical priority clause to provide an orderly method of retiring the bonds, and for the stoppage of interest, and that it did not thereby intend to destroy the equal, joint estate of all of the bondholders in the lien of the bonds. *In the absence of objection* and so long as that equal, joint estate of all of the bondholders is not jeopardized, the city officials are authorized and required to pay off the bonds in their numerical order as required by statute. By so doing, the equal line of all the bonds is not denied, but a method of orderly payment is provided which will prevail under ordi-

nary circumstances. When, however, as in this case (and we confine this decision to these immediate facts), certain of the bonds remain unpaid *after the maturity of the entire issue,* and the remaining security has been obliterated on account of non-payment of general taxes and consequent loss of the assessed property, the lien of all unpaid bonds will attach equally upon all funds in the hands of the city treasurer belonging to the particular district, and the treasurer must pay them out *pro rata,* and not in numerical order. *The fact that other bondholders may have theretofore been paid in the orderly carrying out of the numerical priority clause without objection does not alter the situation."* (Italics ours.)

This case also quotes from the case of New First National Bank of Columbus, Ohio, v. Linderman, 33 Ida. 704, 198 Pac. 159, at 161, where this language is found:

> "The bond holders look primarily to the local improvement district fund for the payment; first of all interest due, then of the matured bonds themselves, in numerical order, as far as the money collected will go."

And the court in the Meyers case remarked concerning it:

> "The bonds were not yet due and the remaining security had not been exhausted, these facts mark-

ing the difference between that case and the one we are considering."

This is squarely in point against appellants' contentions.

In payment of $19,539.10 on principal in the manner directed by the Legislature herein prior to maturity the City complied with these decisions and the statutes. There was no objection from the bondholders and no act on their part to foreclose this lien. Here is another place where the statute determines and limits the trust relationship. The appellants had the legal right to enforce the assessments. How could the city know they were not going to exercise them? The city cannot be liable if they do not.

VII.

WHEN THE ASSESSMENTS WERE FIRST FIXED THEY COULD NOT BE CHANGED FOR THE LIFE OF THE BOND

Appellants in their endeavor to reach the purse strings of Boise City, insist that the City is responsible for its failure to levy additional interest each year when the delinquencies occurred, so as to make payment of interest on bonds which could not be retired as anticipated, because of the delinquencies. We submit that the delinquencies were not the fault of Boise City. That it was entitled to anticipate the payments

of the amounts of the assessments and anticipating those payments it was not authorized to fix the interest higher than the computed amount to retire the bonds with interest as the instalments came in. It is a settled rule of law that during the life of the bond issue when it is once fixed the assessments were fixed and could not be changed.

In Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, 65 A. L. R. 1372, acting on this exact point, the court says:

> "This assessment became the basis as to the individual property owner of the charge on his land indicative of the benefits accrued to him and fixed the amount of the lien against his land and it would have to be paid on such unit to redeem his land from the obligation of the bonds. This unit as to the bondholders contained the definition of their security because, while the bonds were obligations secured by all the lands in the district, in order to enforce their security, foreclosure would be necessary against each particular piece of land in the district to the amount of liability thereon, theretofore determined by the only body authorized to act, namely, the city council. *Therefore for the life of the bond issue, the units of assessment were fixed and* could not be changed. C. S. Sec. 4017." (Emphasis ours.)

This principle is upheld and insisted upon in the case of New First National Bank v. Weiser, 30 Ida. 15, 166 Pac. 213. The court there said:

> "Such taxpayer has cleared himself from all liability on account of the bond issue, or in proportion to the time he has paid, that is to say, if he has paid up his assessments for three years, he has discharged that proportional part of his share of the bonded indebtedness, and the city authorities would have no right to divert any portion of the principal and interest paid by such taxpayer to the payment of the interest and principal on such bonds owed by a delinquent taxpayer."

The court further said that:

> "If the bondholder sees fit to proceed in the manner provided by statute, he can either secure his money from the delinquent taxpayer or obtain title to the property of such taxpayer free and clear of all encumbrance."

Certainly it will not be contended that after the assessment roll was fixed by the City Council that the City Clerk had any authority to change it. To change it so as to increase the interest assessments as contended for by the appellants, would be simply to transfer the delinquencies from people failing to pay their taxes and by building them up, as additional interest, obtain the amounts from those who do pay their taxes. It has been seen throughout the great economic depression

through which we have passed that this has often happened. The faithful taxpayer has been the one who has carried the burden of government while the delinquent taxpayer has been permitted every concession and every extension and moratorium which legally could be given to him. As pointed out in the above case, when a taxpayer determines the amount levied against his property, both principal and interest, he has the right, and was given it in this district, to pay the amount in a lump sum, or he may pay it in installments, and if he pays it in installments he should be required to pay no more than his proportion of the original roll regardless of whether all the rest were delinquent or none were delinquent. Why should he be penalized because of the default of his neighbor who was under the same obligation? Here again the enforcement of this obligation was a burden placed on the bondholders, not the City. By speedy foreclosure their rights could have been protected. Therefore the appellants cannot be permitted to exact any of these amounts from the City.

VIII.

PENALTIES CHARGED ON DELINQUENCIES DO NOT BELONG TO THE BONDHOLDERS

Appellants contend that a penalty of 10 per cent when taxes become delinquent, should be charged

against the City because of its failure to certify this 10 per cent delinquency item to the County.

In the case of Canter v. Lincoln National Life Co., Ind., 8 N. E. 2d 232, the court, on an exact situation, held:

> "Statutory penalties imposed because of delinquencies in payment of principal and interest on improvement bonds do not in absence of statutory authorization belong to bond holders."

Counsel has not pointed out and we have been unable to find any statute requiring these penalties to go into the bond redemption fund. For this reason there can be no liability, and the further reason that the responsibility was not on the City but on the bondholder as above pointed out. Even if it were chargeable it was against the land as part of the assessment available by foreclosure by the bondholder.

IX.

THE CITY IS NOT LIABLE FOR PRINCIPAL PAID ON INTEREST

The appellants ask for the difference in the amount of interest levied and the amount which it paid, which is approximately $10,034.14, claiming that the city should be charged with this deficiency because it failed to levy the additional sum. As above pointed out, we think that such is not the law either under any trust

theory or the statute. The case of Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, passed on this matter specifically, and in that case the court said:

> "The city of Rexburg collected $17,121 to be applied in the payment of principal of the bonds, but instead used this sum to pay interest. The appellant here contends that the City by thus diverting these funds became liable therefor, because of the violation of its duty as collection agent. This court has previously held contrary to appellant's contention in this regard. Broad v. Moscow, 15 Ida. 606, 99 Pac. 101, and this case has been cited and construed in numerous instances to the same effect.
>
> Moore v. Nampa (C. C. A.), 18 F. 2d 860; Id., 276 U. S. 536, 48 S. ct. 340, 72 L. Ed. 688.
>
> Gagnon v. Butte, 75 Mont. 279, 243 Pac. 1085, 51 A. L. R. 966, note.
>
> See, also, Capitol Heights v. Steiner, 211 Ala. 640, 101 S. 451, 38 A. L. R. 1264, note."
>
> And see Richardson v. City of Casper (Wyo.), 45 P. 2d 1, which cites with approval the Bosworth v. Anderson case and holds that the City is not liable for paying principal on interest.

As above noted, the bondholders were charged with notice of the first delinquencies and it was their duty to protect their interest therein. Since the legal rights to assessment by express provisions of the statute, was

in the bondholder and not in the City, the reason is clear why our courts have refused to charge cities in these cases, with anything except for the safe keeping and application of the funds actually received and that no further liability exists. Any other responsibility is specially placed in the hands of the cestui, the bondholders, in order that they may, as stated in the Weiser case, have a plain, speedy and adequate remedy at law for their protection.

X.

THE LACHES OF THE BONDHOLDERS BARS ANY RIGHT OF ACTION AGAINST THE CITY

It will be observed from exhibit "A", to the second supplemental account (R. 94), that on the very first instalment there was a delinquency in taxes paid of $4,364.48. Of this delinquency and the subsequent proportionate delinquencies, the bondholders were charged with notice. To them were transferred "all the right and interest of such municipality, in and with respect to every such assessment and the lien thereby created against the property of such owners," (Sec. 49-2725 I. C. A., Sec. 4023 C. S.). They could have and are the only ones who could have, from the period of that first delinquency, enforced their rights as against the property, but instead of doing that they have stood supinely by, slept on their rights, watched the entire proceeding, fully charged with knowledge

of the condition and of the responsibility of learning the conditions, for these 16 years from the first delinquency and now say that the City of Boise violated its sacred trust and thus became obligated to them in the amounts that it didn't collect. In the case of Brown-Crummer Investment Co. v. City of Burbank, 17 Fed. Supp. 419, the court had a similar case before it and very pertinently remarked:

> "A bondholder, from the period of first delinquencies, at the end of every fiscal year could have enforced his right to require the tax collector to make the demand and also to require the council to levy the tax. He should not in equity be permitted to lie dormant in this respect for more than two years and then, when a great economic depression and real estate inactivity appears take action to require the tax collection agencies of the City to function."

And in Hammond v. City of Burbank, the Supreme Court of California, in 59 Pac. 2d, 495, at 503, had the following to state:

> "It would be quite unfair to the taxpayers of Burbank to permit the petitioners to set back for eight or nine years and allow surplusses, that under this theory should have been transferred to the bond redemption fund, to be consumed in later years for other purposes, and then compel the city this year to raise by general taxation the total

amount of such surplusses so consumed. The petitioners have slept on their rights for these many years and their laches bars them from this relief at this late date."

In Gray v. City of Santa Fe, 15 Fed. Supp. 1074, on the same subject the court said:

"In view of the existence of a valid and enforceable lien against the abutting property, the absence of any diversion of funds available for payment of the bonds, the absence of any act on the part of the city which caused or contributed to the cause of the asserted deficit in the amount of the uncollected assessments to pay the outstanding bonds, the right of plaintiffs to maintain foreclosure suits in their own name or to mandamus the city to compel enforcement of such liens, it would violate every dictate of the general policy under which special obligations of this kind are widely issued to subject the municipality to a personal judgment for the full amount of such bonds. Powell v. City of Ada, (Okla.) (C. C. A.), 61 Fed. 283; Blanchar v. City of Casper (C. C. A.), 81 Fed. 452; Capitol Heights v. Steiner, 211 Ala. 640, 101 So. 451, 38 A. L. R. 1264; Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, 51 A. L. R. 966, and cases collated in the appended notes."

On the question of the appellants being charged with

notice of the conditions of the funds we call attention to the case of Wheeler v. City of Blackfoot, 55 Ida. 599, 45 Pac. 2d, 298. In that case, in order to meet an instalment in payment of improvement bonds, the City Council transferred in February, 1919, some $8000.00 from the general fund to the special improvement fund and did not withdraw the same until September, 1926, one day before maturity of the remaining bonds, and the court held that since this advancement was made nine years before the maturity of the bonds and resulted in there being sufficient money at all times to retire the bonds and coupons as they matured, there was no reason during those years for the holders of unmatured bonds to exercise any such diligence in urging the collection of unpaid and delinquent assessments against any of the property in the district. Thus conclusively holding that the bondholders were charged with notice of the condition of the fund. In beginning the consideration of the case they stated as follows:

> "Here a loss must be suffered by someone. The loss must fall either upon the general fund of the City of Blackfoot, which means, in the finish, the taxpayers of the City, or else it must be borne by the owners of the improvement district bonds. We are therefore confronted with the question: Upon whom should this loss fall; or in other words, which of the parties litigant stands in the most favorable position to merit consideration in the present case?"

If the same rule is applied in this case, which we apprehend it will be, the court cannot ignore the laches and negligence of the bondholders themselves in failing to protect their interests and the rights held by them to the assessments themselves, in which the City had absolutely no interest, and upon which it was charged only with the collection or receiving of. When the delinquencies occurred there was no duty and we contend no right in the City, since it did not even hold the legal title to the liens or cash assessments, to foreclose any of them. See: New First Nat. Bank v. Weiser, supra, Richardson v. Casper (Wyo.), 45 Pac. 2d, 49-2725 I. C. A., C. S.

In Bogart on Trusts, Vol. 4, Sec. 964, page 2791, he lays down the rule as follows:

> "Long delay and laches with change of condition of trustee leads court to deny cestuis right to accounting."

CONCLUSION

As clearly stated by the District Court, the case is one solely "to conserve and apply the amount already collected by the City" and the plaintiff should not be permitted, by any theory or right, to extend that liability for any reason beyond this limit, and we submit to the court that if these rules are followed as prescribed by the statutes of this state as the State Supreme Court has defined them on statutory trusts, there

can be no more recovered in this action, than the court below allowed. Judgment should be affirmed.

Respectfully submitted,

Z. REED MILLAR,
THORNTON D. WYMAN,
Attorneys for Defendants,
Residing at Boise, Idaho.

Service of the foregoing brief acknowledged this .....day of November, 1938.

RICHARDS & HAGA,
Attorneys for Plaintiffs,
Residing at Boise, Idaho.

No. 8981

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN and ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLANTS' PETITION FOR REHEARING

On Appeal from District Court of the United States for District of Idaho, Southern Division

RICHARDS & HAGA,
Attorneys for Appellants,
Residence: Boise, Idaho.

STRAWN & CO. INC. STATIONERS-PRINTERS, BOISE

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Your petitioners, E. H. Smith, D. N. McBrier, F. B. McBrier, Alice M. Bethel, Charles A. Owen, Morris K. Rodman and Ethel W. Johnston, appellants in the above cause, respectfully petition this Honorable Court to grant a rehearing in said cause, and, as a basis for such petition, your petitioners respectfully show:

Error No. 1

That the court erred in holding that there was no trusteeship on the part of Boise City, except as to the

money actually received by the officers of said City from collections made for the payment of your petitioners' bonds; that as to all duties imposed by law upon the City for the levying and collection of the assessments, its officers were merely special agents or instrumentalities acting, not for the City, but for and on behalf of your petitioners and other bondholders, and that Boise City is not liable for the negligence or failure of its officers in failing to perform the acts which the law requires that they shall perform in connection with the levying and collection of assessments for the payment of your petitioners' bonds.

Argument:

We believe the court's decision as to the trusteeship of the City is too narrow and is not a correct interpretation of the Idaho statutes and state decisions, and conflicts with the decisions of other federal circuit courts of appeals and the highest courts of other states having statutes similar to the Idaho statutes here involved.

The decision is apparently based on the decision of this court in Moore v. Nampa, 18 Fed. (2d) 860, which in turn was based on dicta in the decision of the Idaho Supreme Court in Broad v. City of Moscow, 15 Ida. 606, 99 Pac. 101. The material provisions of that decision rested wholly upon a statute which has long since been repealed. Under that statute, improvement districts and contracts for improvements were handled by a sewer committee of "three substantial tax-

payers and bona fide residents of such city, town or village, who shall be styled collectively the 'Sewer Committee'." That statute provided that a "sewer committee", composed of taxpayers who were not officers of the city but represented those interested in the improvement district, either as landowners or as contractors or bondholders, should be in effect the governing body of the improvement district.

It was the acts of the sewer committee which the court in the Moscow case said were not binding upon the city. The statute provided that the chairman of that committee should execute all written contracts and sign all orders for the payment of money authorized by the statutes. The court says (p. 619):

> "Under this act the contract for sewerage improvement is made with the sewerage committee, appointed under the provisions of this act and the ordinances creating such sewer district. It is not an obligation or contract of the city."

The controversy in that case arose out of the fact that the improvement bonds were not delivered at the time the contractor was entitled to payment, and the bonds bore interest from a much later date. In the course of time the contractor sued the city for the loss of interest during the period between the time he should have received the bonds, or payment for his work, and the time he did receive the bonds. The contractor accepted the bonds and later sued the city for

the loss of interest during the interim. The contract between the contractor and the sewer committee expressly provided (p. 620) that the city in whose name the contract was made by the sewer committee "is but an agent between the owner of the property to be assessed for said improvement and the second party, and that said first party shall not be liable, except as provided by law, for said assessment fund or for any claims or demands whatever against said fund, except as trustee thereof. * * * "

After referring to the contract, the court further says (p. 620):

> "From this provision of the contract we perceive that the parties looked upon the contract as being made for the district, and clearly stipulated that the city was to act only as agent for the distribution and payment of the fund arising from the special assessment made against the property affected by such sewerage works."

Again the court says (p. 623):

> "If, then, the city of Moscow failed to pay the plaintiff at the completion of his contract, and failed to deliver him the bonds which were his due under the terms of his contract, his remedy was against the officers to compel them to perform their duty; that is, to pay him his due and deliver to him the bonds he was entitled to under his contract."

In other words, the contractor was entitled to his money on the completion of the contract, or to bonds bearing interest from that date. After some delay he received bonds for the face amount of his contract, but they bore interest from a date about a year later than the contract stipulated. The court, in effect, held that instead of accepting the bonds thus offered, he should have compelled the sewer committee by mandate, if necessary, to deliver to him the kind of bonds he was entitled to under his contract, and, not having done so, he had no cause of action against the city for damages.

Our construction of Broad v. Moscow, *supra,* is confirmed by the recent decision of the Idaho Supreme Court in Cruzen v. Boise City, 58 Ida. 406, 74 Pac. (2d) 1037, referring to the earlier decision, the court says (p. 414):

> "Broad v. City of Moscow, 15 Ida. 606, 99 Pac. 101, relied upon by the appellant, is not in point as *it involved only the delivery of bonds to a contractor after completing his contract and had nothing to do with payment or collection of assessments by the city.*
>
> "While there are authorities to the contrary, the better reasoned rule as applied to this statute (meaning the statute here in question) supports the judgment." (Citing authorities.) (Our italics.)

The court in the Cruzen case quotes the statute (Sec. 49-2728) set out in the bonds, with emphasis on the exception (p. 411):

> "The holder of any bond issued under the authority of this Article shall have no claim therefor against the municipality by which the same is issued, in any event, *except for the collection of the special assessments made* for the improvement for which said bond was issued, but his remedy, in case of non-payment, shall be confined to the enforcement of such assessments * * * ." (The court's emphasis.)

The court then adds:

> "In other words, respondents recognize that in so far as the *initial security* is concerned, no claim could be made against the city, only against the property in the district, and this is correct, but respondents urge the statute recognizes *that the city is liable for the collection of the assessments* and that the general rule applicable to a private trust would apply, resulting in the responsibility of the trustee for the defalcation of his agent." (Our italics.) And the court held with respondent.

Obviously, the court meant by the expression that the city is liable for the *collection* of the assessments, something more than merely the *disbursement* of the money *after its collection*. The court clearly meant

that the city would be liable for such losses as would result to the fund or to the bondholders because of the negligence or failure of the city to proceed with the levy and collection of the assessments in the manner required by law and so that a valid tax lien would be acquired on behalf of the bondholders against the property liable for the improvements. That is evident from what the court further says (pp. 412-413):

> "The bondholder has no control of the municipal agents and unless protected by liability on the part of the city which selects and does control its agents, would be without any redress whatever. The statute evidently recognized this by making the above noted exception. *As generally supporting liability on the part of the city herein see Henning v. City of Casper, (Wyo.) 57 Pac. (2d) 1264.*" (Our italics.)

We are accordingly referred by the Idaho Supreme Court for the law on the subject of the liability of the city, to Henning v. City of Casper, 57 Pac. (2d) 1264. In that case it appeared that assessments had been levied by the city authorities for a number of years under a statute which was not applicable to the improvements for which the assessments were levied, and the assessments which had been levied were illegal and void under the laws of the State of Wyoming and did not constitute a lien against the property liable for the improvements. There was no way that the negligence or neglect of the city authorities could be cor-

rected and the loss would have to fall either upon the bondholders or upon the city. The bondholders had attempted to foreclose the liens and when the property owners set up the illegality of the assessments, the bondholders had notified the city authorities of the pendency of the foreclosure actions and requested that the city appear and defend the validity of the assessment liens and that the city would be held liable if the court should declare the assessment liens to be illegal and invalid, but the city had refused, failed and neglected to appear or participate in the foreclosure actions and the liens having been held invalid, the bondholders then brought an action against the city for the loss resulting from the void assessments.

The court, after referring to the law as between individuals, says (p. 1268):

> "Principles of justice and honesty fundamentally apply to individuals, municipalities, states, and Nation alike, and should be applied alike, unless constitutional or statutory provisions forbid. Municipalities, it is true, are creatures of the Legislature and have only such powers as are granted them, and cannot do the things prohibited by law, as we held in the first part of Tobin v. Town Council, 45 Wy. 219, 17 P. (2d) 666, 84 A.L.R. 902. But courts ought not, and will not, according to the weight of authority, go too far in brushing aside principles of justice and honesty, and this fact was recognized by us in the second

part of Tobin v. Town Council, supra. To give cities to understand that if they can get some one to buy worthless bonds, the purchaser may go and find his money where he can, and that upon them or their officers rests no duty whatever, does not sound like a salutary rule. Of course, if the city and its officials fulfill their duty in connection with special assessments, nothing further can be expected of them; the contract between the parties, or the statute limiting liability, must then govern, and the city is relieved from any liability, even though there may be a deficiency in the amount collectible. (Citing many authorities) But when there is a failure, neglect, or refusal to perform such duty, a different question is presented.

* * * *

"It may be noted that the latter statute is copied verbatim in the bonds in controversy. It would seem clear that the sections quoted contemplate the existence of assessments from which the bonds may be paid. Surely the Legislature did not intend to confine the bondholder 'to the enforcement of such assessments,' unless the latter existed. And it provided for their existence by mandatory provisions. Moreover, the duty of the city to create them is implied, (Citing many authorities), and the further duty is implied that the assessments shall be valid. (Citing many au-

> thorities) The assessments so far made herein have been declared void, and the duty of the city and its officials, accordingly, has not been fulfilled. * * *"

The Wyoming court reviews the authorities, citing many cases from state and federal courts, including the case of Broad v. City of Moscow, 15 Ida. 606, and says (p. 1272):

> "In cases cited from Indiana, Alabama, and Idaho, the courts hold that the city authorities are the agents of the contractor or bondholder in connection with the levy and collection of assessments. We think, however, that this view is erroneous, and we agree in that respect with Dillon, supra, page 1257."

In referring to Broad v. City of Moscow the court evidently had in mind the generality of the statements in that decision and not the special or peculiar facts on which the decision was based. Much of what was said in Broad v. Moscow is now recognized as dicta and this is clearly shown by the recent decision in Cruzen v. Boise City, 58 Ida. 406, which, in effect, limits the application of the former decision to the old statute providing for the sewer committee. The Idaho court, in the Cruzen case, was content to refer to Henning v. City of Casper for a correct statement of the law on the liability of the city for losses sustained by bondholders from the negligence of its officers.

It should also be noted that the decision in Broad v. Moscow was controlled to a great degree by the *contract* made by the sewer committee for the construction of the sewer. The court repeatedly refers to the provisions of that contract wherein the contractor waived all claim against the city and agreed to accept payment in cash, or bonds as stipulated in the contract. The Idaho court quotes in support of its decision from other authorities based on similar contracts.

An examination of the authorities will show that in the earlier statutes in Idaho and other states the improvement district was considered as a quasi-political entity, separate and distinct from the city government. Decisions based on such statutes are not in point.

This court bases its decision in the instant case to a large degree upon its earlier decision in Moore v. City of Nampa, 18 Fed (2) 860. We submit, however, that that case is not in point. We admit that this court said in that case that,

> "Where there is no liability against the corporation, the corporation authorities do not act as its representatives, but as special agents or instrumentalities to accomplish a public end."

That statement was based presumably on the Moscow case but it was no more pertinent in the Nampa case than in the Moscow case. That question was not involved in either case. That seems clear from the decision of the Supreme Court of the United States

in Moore v. Nampa, 276 U. S. 536, 72 L. ed. 688. An examination of that decision will show that while the Supreme Court affirmed the decision of this court it did not do so on the reasoning or on the grounds set out in the opinion of this court.

We think it is clear from the decision of the Supreme Court that it did not approve the broad rule stated by this court and quoted above. On the contrary, the Supreme Court indicated by many expressions in its decision that the bondholders would have had a cause of action against the city for damages resulting from the negligence or failure of the city officials to perform the duties imposed upon them by the statutes for the levy of assessments and the collection of the taxes and the disbursement of the funds.

In the Nampa case the original engineer's estimate on the cost of the improvement was $118,300.00 and bonds were authorized and issued for $117,000.00 under an ordinance adopted December 6, 1920. The validity of the bonds thus authorized was not in issue. It was later found that the estimate was too low, and without any other engineer's estimate the city authorities passed an ordinance on January 10, 1921, reciting in substance that the cost would be in excess of the engineer's estimate and authorized the issuance of additional bonds to the amount of $43,000.00. The validity of the second issue was the only question before the court, and the attack on that issue was based on the fact that there was no engineer's estimate on

which assessments for the payment of the second issue could be based. The Idaho Supreme Court had held that no contract for the construction of a sewer could be let for an amount in excess of the engineer's estimate. (Lucas v. City of Nampa, 41 Ida. 35, 238 Pac. 288.)

Following that decision, Moore brought an action in tort to recover from the city on the ground that the bonds were purchased because of the recitals in the bonds and certificates of the city officials that the statute had been complied with and that no litigation was pending affecting the validity of the bonds. It will thus be seen that the question involved was the liability of the City of Nampa for a false or erroneous certificate which its city officials made before the bonds were sold. The Supreme Court says (p. 540):

> "He insists that respondent was negligent in failing to have a proper estimate and valid assessments made and in causing the false certificate to be issued, and that the damages claimed were caused by negligence and misrepresentation. The suit is for tort. The demurrer was rightly sustained, unless the complaint shows that a breach by respondent of some duty it owed petitioner caused the damage claimed."

The court then refers to the fact that Moore, when he purchased the bonds, was charged with knowledge of the actual record as it then stood, and with knowledge of the provisions of the statutes that bonds could

not be issued in excess of the engineer's estimate, and that the false certificates were made prior to his purchase of the bonds. The court then says (p. 541):

> "The bonds were void, as held in the Lucas Case, because issued upon assessments made in excess of the engineer's estimate. On the facts disclosed by the complaint, actionable negligence cannot be predicated on the failure of respondent's officers properly to exert their powers and perform their duties in respect of the estimate, assessment and contract for construction of the sewer. Such failure was not a breach of duty owed by respondent to petitioner. He had no relation to the matter until long after the bonds had been issued and sold to another. The facts showing their invalidity were disclosed by the transcript and known to the attorneys on whom he relied long before he purchased them. The complaint is not grounded on anything subsequently occurring.
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> * * * *
>
> " * * * No law required or authorized the making of any certificate. The statutes do not contemplate any such statement. It is not a part of or material to the prescribed proceedings. The city council is the governing body of the city, but it did not make or authorize the statement. * * *
>
> "This action is not based on contract. * * *"

The decision of the Supreme Court of the United

States in Moore v. Nampa has never been considered as supporting the contention that the city will not be liable for the negligence and default of its officers in performing the duties which the statute imposes upon them relative to levying, collecting and certifying the special assessments out of which improvement bonds must be paid. One of the recent and well considered cases on the subject is that of the City of McLaughlin v. Turgeon (C.C. 8), 75 Fed. (2d) 402. There as here a city official had failed to properly perform his duties and the city was held liable for the loss resulting from his default or negligence. The court refers to the decision of the Supreme Court in Moore v. Nampa and to a case from the Tenth Circuit and adds:

> "But these authorities are not in conflict with the views here expressed. In Moore v. City of Nampa, supra, action was brought to recover damages alleged to have been suffered by reason of defendant's negligence and false representations in respect to certain improvement bonds. * * * The suit was for tort, and the court held that the facts showing the invalidity of the bonds were disclosed by the public record of the proceedings and known to plaintiff's attorneys, upon whom plaintiff relied before purchasing the bonds."

After reviewing the authorities, the court further says (p. 407):

"These cases clearly establish the rule that, *where the city has disabled itself from making or collecting an assessment, the city will be primarily liable.* * * * As before said the city was not in the first instance primarily liable for the cost of these improvements, and the question is whether it has been liable because of its breach of duty in enforcing the liability against the property as contemplated by the improvement scheme and the contract thereunder.

"It is to be observed that this statute specifically confers on the municipality the power to collect special assessments for local improvements. * * * The contract, being a valid one, imposed the duty upon the city to make the collection of the special assessment in the manner provided by law. * * * True, the law contemplates that the duty of the city in this regard shall be performed through a certain specified agency, to wit, the city auditor. * * * (p. 410) *The city, having with authority contracted to collect the special assessment in the manner provided by law, and having negligently failed to follow the statutory provisions with reference to collection of such assessments,* committed a breach of its contract, and this action is properly brought for damages for breach of contract. * * * *The plaintiff was not required to resort to mandamus.* * * * The measure of his damage being the contract price, or, in this case, the amount

due on the bonds, as held by the lower court. (Our italics)

The Circuit Court of Appeals for the Tenth Circuit, in Brown-Crummer Inv. Co. v. Paulter, 70 Fed. (2) 184, sustained the right of the bondholders to the penalties which had been remitted under an act passed *after* the bonds were issued, and to the same effect is the decision of the Supreme Court of Oklahoma, in Straughn v. Berry, 65 Pac. (2d) 1203.

The court in its decision in the instant case holds that the icty was not trustee for the bondholders except only as to the fund in its possession from the collection of taxes. Limiting the obligation of the city as thus interpreted is presumably due to what we consider the erroneous application of the decision of the Idaho Supreme Court in Broad v. Moscow, 15 Ida. 606, 99 Pac. 101. We again call attention to the recent decision in Cruzen v. Boise City, 58 Ida. 406, 74 Pac. (2d) 1037, wherein the court does not limit the obligation of the city as trustee, but emphasizes the exception contained in Sec. 49-2728, which exonerates the city from liability for special improvements, "*except for the collection of the special assessments made for the improvement for which said bond was issued.*"

Obviously the word "collection" as used in this statute embraces more than merely the disbursement of the funds after they have been collected. The collection of the assessment clearly includes the do-

ing of all things required under the statute in connection with the levying and certifying of the special assessment to the county authorities so that they may be collected by the county treasurer.

The word "trustee" is defined in 65 Corpus Juris, p. 215, as follows:

> "In a broad sense a trustee is defined to be a person in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another."

Bouvier's Law Dictionary defines it as

> "A personal obligation for paying, delivering, or performing anything where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted."

Black's Law Dictionary defines it as

> "An equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with the property for the benefit of some other person, or for the benefit of himself and another or others according to such confidence."

To the same effect is Templeton v. Bockler, 73 Ore. 494, 144 Pac. 405, 409, and the Restatement of the Law of Trusts and Trustees, Sec. 1.

The Idaho statutes contain a complete code cover-

ing special improvements, the letting of contracts, the determination of the benefits that will be derived from such improvements by the several pieces and lots embraced in the improvement district and for the issuance and payment of the bonds. These statutes require that the assessment roll be prepared and filed before any improvement bonds can be issued. The assessments so made constitute a lien against each piece for the amount shown on the assessment roll. The lien thus created is for the equal and pro rata benefit of each bond and constitutes the security for the payment of all bonds.

The city, under Sec. 49-2719, (set out in the appendix of our original brief), is required to levy annually a special assessment sufficient to redeem the instalment of the bonds maturing next thereafter. The levying of such annual assessments, the giving of notice to the taxpayers of the time of payment; imposing the penalties for default in payment, and certifying the delinquent assessments to the county treasurer for collection are obligations which the statute places upon the city and which necessarily must be performed by the city officers to whom that particular function has been delegated by law or city ordinance.

The statutes vests in the city control over the bondholders security. From the time the city issues the bonds until the last bond is redeemed, the city is a trustee for the bondholders. As such trustee it makes

the annual assessments; it causes notices to be issued for the payment of taxes; it imposes the penalties for default in payment; it certifies the delinquent taxes to the county treasurer for collections, and it disburses the money, whether collected by the city clerk before default is made by the taxpayer or whether collected by the county treasurer after the tax becomes delinquent.

We can see no logical basis and no sound reason for saying that the city becomes trustee only when the money is paid to its officers, and that as to the handling of the security and the collection of the assessments it is merely the bondholder's agent. Clearly, the city occupies the same relation to the bondholders' security as does the private trustee under a bond issue. One has control over the security substantially to the same degree and extent as the other. The city operates under an obligation imposed by statute; a private trustee operates under an obligation imposed by a trust deed or mortgage securing the bonds. In each case there is a trust estate which constitutes the security for the bonds. In each case the trustee has obligations to perform in the matter of collecting the payments due the bondholders.

This court suggests in its opinion that the bondholders have the right to foreclose their lien if the taxes become delinquent. That right is but an illusion. It is impossible of enforcement for the reasons shown in our original brief, pp. 51 and 52. We think there is

no answer to our argument on that point. The state and federal courts have repeatedly held that where the city authorities have failed to make a valid levy and cannot make a re-assessment to protect the bondholders' rights, then the city is liable for the loss.

City of McLaughlin, S. D., v. Turgeon (C.C. A. 8) 75 F. (2d) 402, 406, 407;

Henning v. City of Casper, 51 Wyo. 1, 57 Pac. (2d) 12611;

Powell v. City of Ada (C.C.A. 10) 61 F. (2d) 283, 286;

Barber Asphalt Paving Co. v. City of Denver C.C.A. 8) 72 F. 336, 339;

Denny v. City of Spokane (C.C.A. 9) 79 F. 719;

Bates County, Missouri, v. Willis (C.C.A. 8) 239 F. 785, 792;

District of Columbia v. Lyon, 161 U.S. 200, 16 S. Ct. 450, 40 L. Ed. 670;

Grand Lodge, A.O.U.W., v. City of Bottineau, 58 N.D. 740, 227, N.W. 363, 368;

Weston v. City of Syracuse, 158 N.Y. 274, 53 N.E. 12, 15, 43 L.R.A. 678, 70 Am. St. Rep. 472;

Freese v. City of Pierre, 37 S.D. 433, 158 N.W. 1013, 1016;

Coolsaet v. City of Veblen, 55 S.D. 485, 226 N.W. 726, 728, 67 A.L.R. 1499;

Price v. City of Scranton, 321 Pa. 504, 184 A. 253, 254.

Under the decision of this court, holders of improvement bonds are the orphans of the law. The city, under that decision, may with perfect immunity and impunity disregard all the obligations imposed on it by law for the protection of the bondholders, except to disburse the fund if a taxpayer sees fit to voluntarily pay his assessments.

We submit that the Idaho statutes do not justify that conclusion. The statutes contemplate that those receiving the special benefits from an improvement are primarily liable for the payment of the improvement; that the property within the improvement district constitutes the bondholders' security; that a bondholder purchases his bond upon the strength of that security and upon the obligation imposed upon the city by law to levy the assessments according to law and enforce all the remedies available to the city authorities for the benefit of the bondholders. The bonds are sold upon that understanding and if that be not the law, then improvement bonds should not be sold to the public.

To a very large degree public improvements are now made through the sale of special improvement bonds. Sound public policy demands that the city be required to perform the duty imposed on it by law for the collection of the assessments and the protection of the bondholders.

We refer again to the latest expression of the Supreme Court of the State of Idaho on this subject. That court, in Cruzen v. Boise City, 58 Ida. 406, 74 Pac. (2d) 1037, referred to the fact that the bondholder had no control over the municipal agents and that he would be without protection if the city were not liable for its neglect in the performance of its statutory duties that may result in loss to the bondholders. It referred to the case of Henning v. City of Casper, (Wyo.) 57 Pac. (2d) 1264, for a statement of the law as to the liability of the city, and we have already quoted from that decision.

Error No. 2

The court erred in holding and deciding that if the officers of Boise City neglected to levy the assessments or pursue the procedure provided by law for the levying and collection of such assessments, the only remedy available to your petitioners and other bondholders was to compel such officers by mandate to perform the duties in the manner required by law.

Argument:

The above doctrine, which apparently largely influenced the decision of the court, is based upon what we consider the same erroneous rule that we have discussed under Error No. 1, and which, in brief, is based on the theory that the city has no legal responsibiilty in carrying out the provisions of the statute

for the assessment and collection of the assessments and the disbursements of the funds, except where the money is misappropriated by an officer of the city and wongfully diverted to his use, as in the case of the embezzlemnt by the city clerk, in which case the bondholder may have relief in an ordinary action for damages.

It will be noted from the decisions which support the right of bondholders to recover damages for negligence or neglect of duty by the city officers, that in those cases the court did not invoke the rule that the bondholders should have been continuously on guard to see that a wrongful act was not about to be committed, or a duty about to be neglected. We think the doctrine is unsound that the bondholders must stand watch over city officers and resort to a writ of mandate in order to protect their rights.

In the Cruzen case the Idaho Supreme Court held clearly that the city was liable for the embezzlement of funds by the city clerk, notwithstanding the bondholder had not sought by writ of mandate to compel the clerk to pay the money to the bondholders instead of appropriating it to her own use. There would seem to be no logical basis for requiring the bondholders to resort to writs of mandate for the protection of their rights in other cases where the application for the writ would necessarily have to be made after the time has expired within which the officer must perform his duty.

The law fixes a time within which the assessments shall be levied, the collections made by the clerk, and the delinquent assessments certified to the county treasurer. Unless the officer proclaims in advance that he will not perform his duties, the bondholders cannot obtain relief through the court until after the time has expired for the doing of the act that the officer has failed to do. In paying certain bondholders more than their pro rata share, it would be too late to apply for the writ of mandate after the payment has been made. We submit therefore that the doctrine is not sound, that the bondholders must apply for a writ of mandate for the enforcement of their rights, and that the city is not liable for the damages sustained, except in the one case where the funds are misapprpriated.

Error No. 3

That the court erred, (a) in holding and deciding that it would be inequitable to hold the city liable for paying to the bondholders, whose bonds had been paid in full, more than their pro rata share of the total fund available for the payment of the bonds issued, and (b) in denying petitioners the right to recover from the city for wrongfully paying certain bondholders more than their pro rata share.

Argument:

That part of the court's decision which denies petitioners the right to recover from the city the

loss which petitioners will sustain because the city paid to certain bondholders more than their pro rata share, apparently rests on the doctrine that petitioners should have, by writ of mandate or injunction, protected their rights when the city was making disbursements and redeeming the bonds bearing lower numbers.

Again, we submit that public policy throws upon the city and its officers the obligation of performing the duties according to law, and the responsibility to see that that is done should not by the court be shifted to the bondholders. Surely, there should be some inducement for public officers to perform their duties according to law, and that inducement is the liability their city will incur if they fail to do so. The rule followed by this court throws all responsibility upon the bondholders and removes all liability from public officers if they negligently or carelessly perform or fail to perform the duties specifically imposed upon them by the statute.

Perhaps there was a time when bondholders resided in the community where the improvements were made, and could conveniently keep in touch with the community's affairs, but that period has long since passed. It is a matter of common knowledge that the money for needed public improvements of the character here involved is obtained from bondholders scattered throughout the United States and even in foreign countries. The Legislature clearly had no intention of impairing the sale of the bonds and preventing the

obtaining of needed money for public improvements by throwing upon the bondholders a burden such as is suggested by the decision in this case.

The doctrine on which this court bases its decision makes it an inducement for the city officials to neglect their duties and obligations to the bondholders, for by so doing they will favor the local taxpayers and relieve them of the burden of paying for public improvements.

The theory of the statutes obviously is that the purchaser will inform himself as to the value of the security, and having found that satisfactory, he may proceed on the assumption that the city authorities will faithfully perform the duties imposed upon them by law, and that the city which appoints the public officials to perform such duties will be responsible for their negligence and carelessness and suffer the loss that will result if they fail to properly perform their duties.

The bond (Exhibit A to the complaint, R. 25-28) does not show the amount of bonds that were issued, and there was no occasion for a bondholder who received his interest, to keep a watchful eye over the conduct of the city officials before his bond matured. The excess payments to bondholders were made before the bonds now before the court matured, and such payments were made, as shown by our original brief, pages 42 to 51, at times and under conditions that should have apprised the public authorities charged with the responsibility of disbursing the funds that

the improvement district fund was insolvent. The delinquencies in the tax collections from the very beginning were such as to clearly show that the property could not be sold for sufficient to pay the general taxes and the special improvement assessments. That a serious loss or deficit would result, was apparent to all local officers responsible for handling the collections and disbursements.

Error No. 4

That the court erred in holding and deciding that the record in this case did not contain all the evidence before the trial court and that this court had only a partial record before it, and therefore could not hold that Boise City as trustee for the bondholders had failed to sustain the burden of proof that was cast upon it in its accounting as such trustee.

Argument:

We believe the court overlooked a number of statements in the record which we think show clearly that the record before it includes all the evidence admitted by the trial court, except the original bonds owned by your petitioners and a copy of the bond is attached to the complaint as an exhibit. It must be remembered that the city at all times contended it could not make a complete report because of the condition of its records. The reports which it made under the order of the court were qualified by the statement that the in-

formation submitted was based upon "the audit of Lybrand, Ross Brothers & Montgomery." (R. 81-82, 84.) In the supplemental report filed by the City it is stated that, *"the accounting which follows contains all of the information in the hands of Boise City,* of the property included" in the District, etc. (R. 87); and in the second supplemental report it is stated: *"With the matters furnished herein, Boise City has furnished all of the facts pertaining to said Local Sidewalk & Curb Improvement District No. 38 that it is possible for it to furnish."* The reports so furnished by the City are set out with all the fullness that the rules of the court would permit in a record on appeal. The trustee says that its records are in such condition that it cannot furnish more information. Surely that does not shift the burden of proof.

It is true that the record does not contain the complete audit of Lybrand, Ross Brothers & Montgomery, for that covers *all districts and the general fund of the City.* The court refused to admit that audit in evidence, except for the sole purpose of checking the excerpts therefrom that pertained to Local Sidewalk & Curb Improvement District No. 38 (R. 67). The record recites that the audit "was admitted for the purpose of showing the connection and pertinency of certain excerpts from such report, which counsel stated he proposed to offer in evidence, and which he said were particularly pertinent to the issues in the case. *The audit was received for that purpose."* The record

then contains the excerpts from the audit pertaining to District No. 38. (R. 67-78.)

We think that the fair construction of the record justifies the statement that it contains all that part of the audit which pertains to the District here involved, and all the evidence that was admitted by the trial court as having any bearing upon the issues before it.

On page 95 of the record there is set out the prayer for the settlement of the "Statement of the Evidence" on appeal and it will be noted that counsel for appellant prayed that the statement *"be settled, approved and allowed by the court as a true, full, correct and complete statement of all the evidence taken and given on the trial of said cause."* Following that prayer is the order of the court which recites that after hearing counsel for the respective parties as to the matters that should be included in the statement, "the foregoing statement is settled as *a true, complete and properly prepared statement under Equity Rule No. 75.*" (Our italics.)

In view of the above we respectfully submit that the court is not justified in saying:

> "We have not before us all of the evidence taken before the trial court. In the absence of such evidence, we are not in a position to say that the trustee failed to sustain the burden of proof that that was the entire amount received by it, or that the trial court was in error in finding the

amounts received and disbursed by the city on account of the improvement district in question."

The doctrine of this case affects all cities in Idaho that have issued improvement bonds, and all holders of such bonds. It may well reach beyond the borders of the state. We think under the circumstances that further consideration should be given to the questions presented by the errors assigned.

Wherefore we respectfully pray that a rehearing be granted.

Respectfully submitted,

RICHARDS & HAGA,
OLIVER O. HAGA,
Attorneys for Petitioners.

State of Idaho, }
County of Ada, } ss.

I, Oliver O. Haga, of counsel for petitioners above named, *Do Hereby Certify,* that in my opinion the foregoing petition is well founded and that it is not interposed for delay.

OLIVER O. HAGA,
Of Counsel for Petitioners.

Dated July 24, 1939.